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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE, PETITIONER

vs.

MEAD'S FINE BREAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 14, 1954
CERTIORARI GRANTED JUNE 7, 1954

United States Court of Appeals

TENTH CIRCUIT.

No. 4615.

MEAD'S FINE BREAD COMPANY, APPELLANT,

vs.

L. L. MOORE, d/b/a MOORE'S BAKERY, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO.

FILED FEBRUARY 5, 1953.

SUPPLEMENTAL RECORD FILED MARCH 28, 1953.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

No. 4615.

MEAD'S FINE BREAD COMPANY, APPELLANT,

vs.

L. L. MOORE, an individual doing business as
MOORE'S BAKERY, APPELLEE.

STATEMENT OF POINTS.

Comes now Mead's Fine Bread Company, Appellant in the above styled and Numbered cause and designates the points upon which appellant will rely on appeal.

1. The trial court erred in refusing to direct a verdict for appellant for each of the reasons set forth in its motion for verdict.

2. The trial court erred in refusing appellants motion for Judgment notwithstanding the verdict for each of the reasons set forth in said motion.

3. The trial court erred in refusing to grant appellants motion for New Trial for each of the reasons set forth therein.

4. Appellee's complaint is not actionable under the Robinson-Patman Act for the reasons that:

(a). the purchases complained of were not in interstate commerce within the meaning of the act;

(b). the appellant was not engaged in commerce within the meaning of the act;

(c). the purchases of which complaint is made were wholly local having no impact or effect upon interstate commerce, and

(d). the purchases of which complaint is made did not result in public harm.

5. The trial court erred in including in its charge, over the objection of appellant, instructions upon and requiring or permitting the jury to find and assess damages under the act notwithstanding the fact that appellant was not engaged in interstate commerce.

6. The appellee having failed to establish that the commodities in question were of like grade and quality may not recover for an alleged discrimination under the act.

7. The evidence in this case conclusively shows that the sales complained of did not and could not have had the probable effect substantially to lessen competition or tend to create a monopoly in any line of commerce and for this reason recovery may not be had under the act.

8. Recovery may not be had under the act for the reason that the evidence in this case conclusively shows that appellant's reduction in its price of bread was made in response to a boycott of its bread by the merchant's in the City of Santa Rosa, New Mexico, and that the effect of such boycott was a changed condition affecting the market for and marketability of appellants goods.

9. The appellee's only complaint is appellant ought not be permitted to compete with him on an equal basis. Such a complaint is not actionable under the act.

10. The trial court erred in permitting the Jury by its charge, over the objection of appellant, to take into consideration and speculate on alleged loss of profits for the reason that:

(a). The plaintiff failed to establish that he ever made or could have made a profit on his product.

(b). The plaintiff admitted that he could not make a profit on his product sold in fair and open competition.

(c). The plaintiff did not establish by evidence the existence of profit nor did he establish by substantial evidence a basis upon which such profit, if any, could be reasonably determined, calculated or estimated.

11. The trial court erred in permitting the Jury by its charge, over the objections of the appellant, to take into con-

sideration and speculate on alleged loss of value of plant and property in the absence of proof of such loss or proof of facts and circumstances from which such loss could be reasonably determined, estimated or calculated by the Jury.

12. The Trial court erred in permitting the Jury by its charge, over the objections of the appellant, to take into consideration and speculate on alleged loss of value of plant and property in the absence of substantial evidence of the fact that loss was sustained.

13. The trial court erred in permitting the jury by its charge, over the objections of the appellant, to take into consideration and speculate on an alleged loss of value of good will in the absence of proof of the fact of such loss and proof of facts and circumstances from which such loss could be reasonably determined, estimated or calculated.

14. The trial court erred in declining appellants requested Charge No. 1 containing instructions upon and submitting to the Jury the question of whether or not the appellants acts were justified under the act.

15. The trial court erred in refusing to permit the appellant to show and have the jury pass upon the question of whether or not this appellant was under the circumstances of this case justified (See 13b, Title 15 USCA) in selling its bread at a reduced price.

16. The trial court erred in declining appellants requested charge No. 2, containing instructions to the effect that the jury may not take into consideration unlawful gains.

17. The trial court erred in declining appellants requested charge No. 3 containing instructions to the effect that appellee may not recover for losses which he could have prevented by exercise of reasonable efforts.

18. The trial court erred in declining appellants requested charge No. 6 containing instructions to the effect that appellee may not recover for losses proximately caused by reason of his failure to conduct his business with reasonable skill and diligence.

19. The trial court erred in declining appellants requested charge No. 7 containing instructions to the effect that ap-

pellee may not recover for injury or losses solely caused by his own acts.

20. The attorneys fees allowed by the trial court are excessive and unreasonable, and without support in the evidence.

21. The attorney fees allowed by the trial court are excessive and unlawful for the reason that the trial court included in the amount allowed an additional sum "because the case will be appealed by the defendants to the court of appeals and probably the Supreme Court."

22. The appellee by a scheme of fraud and deceit did procure perjured testimony of three witnesses on vital points of fact for the purpose of casting doubt upon the testimony of appellant's witnesses and did knowingly take advantage of such false testimony thereby inflaming the jury against appellant, resulting in an unconscionable verdict.

23. The verdict of the jury is excessive and beyond all conscious reasoning and give under the influence and passion and prejudice against the appellant corporation.

24. The verdict of the jury and the amount by it assessed as damages is wholly without support in the evidence.

Respectfully submitted,

EDWARD W. NAPIER,

HOWARD F. HOUK,

By Edward W. Napier.

Attorneys for Appellant

Mead's Fine Bread Company.

[Proof of service on original.]

Filed February 9, 1953.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE CARL A. HATCH, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

L. L. MOORE, d/b/a MOORE'S BAKERY, PLAINTIFF,

VS.

MEAD'S FINE BREAD COMPANY, DEFENDANT.

No. 1457.—Civil.

Second Amended Complaint.

4 The plaintiff complains of the defendants and for his cause of action alleges:

I.

That plaintiff is a resident of Artesia, Eddy County, New Mexico; that at the time of the acts complained of herein he was engaged in the baking business in the town of Santa Rosa, Guadalupe County, New Mexico; and that he was then and there an individual doing business as Moore's Bakery and was engaged in the manufacture and wholesale and retail sales of bread and other bakery products wholly within the state of New Mexico.

II.

That defendants at all times herein mentioned were and now are corporations authorized to do business under and by virtue of the laws of the state of New Mexico; that defendants have their principal place of business in the city of Clovis, New Mexico; that A. K. Miller, whose address is 214 West Second Street, Roswell, New Mexico, is the statutory agent of the defendant Mead Service Company upon whom process may be served; and that Wesley R. Tunnell, whose address

in 315 West Seventh Street, Clovis, New Mexico, is the statutory agent of the defendant Mead's Fine Bread Company upon whom process may be served.

III.

5 That defendants at all times herein mentioned were and now are engaged in the manufacture and sale at wholesale of bread and other bakery products in interstate commerce, to-wit: In the states of New Mexico and Texas; that at all times material hereto defendants manufactured bread in Clovis, New Mexico, and sold same in both New Mexico and Texas on regular schedules; that they are part of an interstate combination of corporations having interlocking directorates, common majority stockholders, common management, a common advertising program, a common purchasing arrangement, and a common trade name, to-wit: "Mead's Fine Bread"; that defendants are so connected with Mead's Fine Bread Company of Lubbock, a Texas corporation with its principal place of business at Lubbock, Texas, and Mead's Fine Bread Company of Chaves County, a New Mexico corporation with its principal place of business at Roswell, New Mexico; that said corporations, together with defendants, are operated as an integrated organization with headquarters at Lubbock, Texas, and therefore that all transactions of said corporations and defendants constitute interstate commerce; that, in addition, defendants are connected with another Texas corporation, Mead's Fine Bread Company of Big Spring, by means of interlocking directorates and common stockholders; and that defendants at all times mentioned herein were and now are subject to the provisions of the Robinson-Patman Price Discrimination Act, enacted by the Congress of the United States on June 19, 1936.

IV.

That, within the year next preceding the commencement of this action and during a period of approximately two months thereafter, defendants sold bread to various retail stores at prices that varied from community to community and bore no uniform relation to production and transportation costs.

V.

That defendants used such variations in prices as a means and for the purpose of eliminating competition and creating a monopoly in the bakery business in the area in which they operated.

VI.

That defendants from about September 3, 1948, to about April 26, 1949, sold bread to retail stores in said town of Santa Rosa for seven cents per pound of sliced white bread; that the standard wholesale price for such bread in the area in which defendants operated was fourteen cents per pound, which price prevailed in said city of Clovis where defendants manufactured said bread; that said price of seven cents per pound was less than the cost of producing said bread in said city of Clovis and transporting same to said town of Santa Rosa; that prior to September 3, 1948, defendants' wholesale price for sliced white bread in said town of Santa Rosa was fourteen cents per pound; and that while said price was reduced to seven cents per pound as aforesaid the retail stores to which defendants sold bread in the town of Santa Rosa were required by defendants to sell same at a retail price of ten cents per pound.

VII.

That defendants reduced their wholesale prices in said town of Santa Rosa as aforesaid for the purpose of eliminating competition and creating a monopoly.

VIII.

That defendants' use of such varying price levels constitutes price discrimination within the meaning of said Robinson-Patman Price Discrimination Act, and that the effect of such discrimination may be substantially to lessen competition, to tend to create a monopoly in the baking business, and to place a substantial burden upon interstate commerce.

IX.

That as a result of said price discrimination in said town of Santa Rosa plaintiff suffered loss of business to his damage in the sum of Fifteen Thousand Dollars (\$15,000.00).

X.

7 That said loss of business caused plaintiff to become insolvent and to lose his bakery business in said town of Santa Rosa on or about February 28, 1950, and to lose anticipated profits since that date, to his further damage in the sum of Twenty Thousand Dollars (\$20,000.00).

XI.

Wherefore, plaintiff prays judgment against defendants in the sum of \$35,060.00, that said judgment so recovered be trebled in accordance with the statute in such cases made and provided, for costs of suit, for a reasonable attorney fee, and for such other and further relief as to the Court may seem meet and proper.

Dated this 12th day of January, 1952.

DEE C. BLYTHE,
Attorney for Plaintiff.

[Proof of service on original.]

Filed January 14, 1952.

Amended Answer of Mead's Fine Bread Company.

9 Comes now the defendant Mead's Fine Bread Company without waiving its Motion to Dismiss but still insisting upon the same and pleads as follows:

I.

a. This defendant admits the allegations contained in Paragraphs I and II of plaintiff's Second Amended Complaint, except that this defendant alleges that the plaintiff purchased and sold bakery products within and without the State of New Mexico and specifically denies that plaintiff's

bakery business was limited to the manufacture and whole-sale and retail of bread and other bakery products wholly within the State of New Mexico.

b. This defendant denies the allegations contained in Paragraphs III, IV and V of plaintiff's Second Amended Complaint.

c. This defendant denies the allegations contained in Paragraph VI of plaintiff's complaint, except that the defendant Mead's Fine Bread Company, admits that it sold sliced white bread in the City of Santa Rosa alone for 7¢ per pound from on or about September 3, 1948, until on or about April 26, 1949; that this defendant only admits that on September 3, 1948, the then posted or standard price of white bread was 14¢ per pound in the City of Santa Rosa, but denies that such price prevailed for any length of time after September 3, 1948.

10 d. This defendant denies the allegations contained in Paragraphs VII, VIII, IX, and X of plaintiff's Second Amended Complaint.

II.

This defendant denies a discrimination in prices of bread or any other bakery product sold in Santa Rosa, New Mexico, and specifically denies that sales or purchases of its bread in Santa Rosa, New Mexico, during any time of which complaint is made was in commerce within the meaning of the act.

III.

This defendant denies that it was engaged in interstate commerce within the meaning of the Act at any time complained of and particularly denies that the sales complained of were sales or purchases in such commerce, but says that this defendant was at all times in question engaged only in intrastate commerce; and that all sales and purchases complained of were intrastate sales.

IV.

This defendant pleads that any price reduction of bread

made by it in Santa Rosa, New Mexico, was made not for the purpose of lessening competition, creating a monopoly or to injure, destroy or prevent competition, but was made in response to changed condition affecting the market for and the marketability of its merchandise within the meaning of the Act.

V.

This defendant denies not only the discrimination but denies that the effect of any sales or sale made by it of bread in Santa Rosa may have been substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them.

VI.

Defendant alleges that it has been selling its bakery products in the City of Santa Rosa daily since the first
11 part of January of 1948, and had on September 2, 1948, eleven (11) customers in Santa Rosa that daily purchased its products at wholesale and resold the same at retail. That your defendant's wholesale business was, prior to September 3, 1948, thriving and profitable and defendant had reason to believe that it would gain additional business and enjoy a prospering market. That on or about September 1, 1948, all of the merchants who deal in bakery products, including defendant's customers (excluding one small customer) unlawfully conspired to give to plaintiff a monopoly of the wholesale bakery business in Santa Rosa, and pursuant to said conspiracy and plan executed a written agreement whereby said merchants agreed to purchase only the bakery products of the plaintiff to the exclusion of this defendant; and in this connection defendant alleges that at all material times it was plaintiff's sole competitor. That on or about the 1st day of September, 1948, said merchants held a meeting and did then and there agree among themselves that on a certain day, which day defendant alleges to be on or about September 3, 1948, they would in concert refuse to purchase and stock defendant's bakery products and only pur-

chase only plaintiff's bakery products. That on such effective date of the boycott or plan of agreement your defendant offered its products to its eleven customers in Santa Rosa but each refused to purchase or accept defendant's products and was advised that all of the merchants in the town had signed an agreement to purchase only plaintiff's products in order that plaintiff could have a monopoly of the bakery business in Santa Rosa. Defendant alleges that prior to the effective date of said boycott it had spent large sums of money in advertising its products in Santa Rosa and contacting and gaining the good will of the merchants and people of Santa Rosa. That it had expended its time and money in convincing the people of Santa Rosa that it was economical in many ways to buy bread baked rather than to purchase ingredients and spending the time to bake a home bread. That the defendant installed expensive display racks and bread racks

12 in grocery stores, giving away many hundreds of samples, purchased equipment to service the City of Santa Rosa, including a truck costing in excess of \$3,000.00, leased a warehouse in Santa Rosa, employed additional personnel, purchased additional and bigger bakery equipment for its plant in Clovis, New Mexico, and had contracted months in advance to purchase flour, milk, sugar, shortening and other ingredients in sufficient additional quantities to manufacture bakery products for Santa Rosa. That to give up the Santa Rosa market and permit itself to be unlawfully and forcibly driven from said market would have resulted in severe financial loss to defendant. Defendant says that the market held by it prior to September 3, 1948, was a property right that could be bought and sold. That without markets such as Santa Rosa a bakery would have little or no value. That said merchants by and through their conspiracy sought to and did take without right defendant's property leaving the defendant without practical recourse except to find some method of inducing its customers to purchase and stock its products. That defendant reduced the price of its white sliced bread only and only in the City of Santa Rosa, leaving all other items sold by it in Santa Rosa at current or area accepted prices, but only regained a fractional part of its market. That this defendant has made many efforts to persuade the return of its market but that it has failed to regain the same to this date. Defendant says that any sales

of bread made by it at 7¢ per pound was made in good faith wholly justified under the Robinson-Patman Act to protect and preserve its property rights and its market in the City of Santa Rosa. That such sales were made solely for the purpose of attempting to regain its property and market purchased and paid for with its money and labor.

VII.

Defendant says that the sales of said bread made by it as aforesaid were not made for the purpose of creating or tending to create a monopoly or to lessen, injure, destroy or prevent competition of any character, but that such reduction was made solely to maintain itself in the market it had earned and was entitled and to prevent a monopoly and
13 to prevent the lessening, injuring, destroying and preventing of competition within said market.

VIII.

Defendant pleads that the plaintiff sought to monopolize the entire bakery market in Santa Rosa, and on or about September 1, 1948, made certain threats concerning the removal of his business to his landlord and other leaders of the city and demanded that he be given a monopoly of the entire wholesale and retail bakery business in said city. That at his special instance and demand all the merchants and dealers in bakery products, together with the assistance of the plaintiff, did attempt to and did give and grant to the plaintiff a monopoly in satisfaction of such demand on the part of the plaintiff on or about September 3, 1948, by refusing to purchase and stock defendant's products. That the plaintiff did gain a monopoly of such business in the City of Santa Rosa and retained such monopoly in whole or in part until on or about January 1, 1950. That the wrongful demand and wrongful taking of the defendant's market in whole or in part lawfully justified defendant's sale of bread at a reduced price as aforesaid within the provisions of the Robinson-Patman Act.

IX.

Defendant says that the boycott resulting in the monopoly

to the plaintiff and the continuing partial monopoly and withholding of defendant's market was a result of the demand, request and action of the plaintiff; and that this defendant reduced the price of white sliced bread only and only in the City of Santa Rosa after it has been driven from and excluded from its market in said City, which it did not regain. Defendant alleges that the plaintiff could have stopped the boycott at any time and put an end thereto, but that the plaintiff permitted the same to be continued at all times. Defendant alleges that had the plaintiff put an end to its boycott as aforesaid it would have immediately had its market and sales of bread at a reduced price terminated.

14 Defendant alleges it reduced the sales price of its bread as aforesaid and continued such sale thereof in a good faith attempt to regain its market and that such reduction in price and sales made by it were wholly justified under the provisions of said Robinson-Patman Act; and that all damages alleged to have been sustained by the plaintiff were self inflicted and not recoverable.

X.

Defendant says that a short time prior to September 3, 1948, plaintiff chose to move his business to Tucumcari, New Mexico, and leased a building in said town for the purpose of housing his bakery. That plaintiff returned to Santa Rosa to complete the move to Tucumcari and was asked to remain in Santa Rosa. That plaintiff agreed to so remain upon the sole condition that he be given a monopoly of the bakery business in said City. To accomplish this plaintiff well knew that his sole competitor, the defendant herein, had to be driven from its market in Santa Rosa. That on September 3, 1948, the defendant was driven and unlawfully excluded from the market in violation of the Anti-Trust Laws of the State of New Mexico and the United States of America; but defendant alleges that plaintiff failed to gain a total monopoly as was required by him and that he elected to remain in Santa Rosa and in a market set to strife by the boycott thereby inflicting upon himself all injury, damage or loss complained of by him, if he did suffer the same. That all injuries, damages and losses alleged to have been sustained

by the plaintiff were self inflicted and for this reason not compensable under the Act.

Wherefore, defendant respectfully prays the court that plaintiff take nothing by his action, that he be denied all recovery and relief prayed for, and that this defendant recover all costs in this behalf expended, and for such other and further relief defendant may show itself justly entitled.

HOWARD HOUK,
EDWARD W. NAPIER.
By EDWARD W. NAPIER,
Attorneys for Mead's Fine
Bread Company.

15 [Proof of service on original.]

Filed January 23, 1952.

Verdict.

49 We, the jury, being duly empaneled and sworn to try the issues in the above entitled cause, do find the issues in favor of the plaintiff and assess the damages in the amount of \$19,000.00.

W. E. MUNDY, Foreman.

Filed October 10, 1952.

Affidavit of Costs.

S-1 State of New Mexico, the County of Curry, ss.

Before me, the undersigned authority, personally appeared Dee C. Blythe, who, being by me duly sworn, upon his oath states that he is an attorney for the plaintiff, L. L. Moore, in the above styled and numbered action; that he has made all of the plaintiff's disbursements, in his said capacity of attorney; and that the following is a true and correct itemized list of the taxable costs and disbursements made by plaintiff in said action:

March 8, 1949, U. S. District Court docketing fee.....	\$ 15.00
March 8, 1949, U. S. Marshal, service of summons.....	2.00
March 12, 1949, U. S. Marshal, service of alias summons	2.00
May 31, 1949, Donald O. Jensen, taking depositions of Thurston L. Thomas, Perry Crawley, Raymond H. Cooley, J. W. Hoover, Raymond R. Seale and Chester A. Baker	108.50
August 16, 1949, Oscar Taylor, taking depositions of Billy O. Mead and Mack Mead	25.90
October 7, 1949, Frank F. Stone, Mileage and witness fee	36.86
October 7, 1949, Lehn G. Engelhart, mileage and witness fee	12.68
October 7, 1949, U. S. Marshal, service of subpoenas	1.50
October 26, 1949, Oscar Taylor, taking depositions of Rex Webster and E. E. Corcorran	61.20
December 12, 1949, U. S. District Court, filing notice of appeal.....	5.00
March 29, 1950, U. S. Court of Appeals, docketing fee	25.00
December 26, 1950, U. S. Court of Appeals, certiorari record	4.40
September 22, 1952, U. S. Marshal, serving subpoena..	.50
September 30, 1952, Lehn G. Engelhart, witness fee	4.00
September 20, 1952, Milton Moise, witness fee.....	4.00
September 30, 1952, U. S. Marshal, service of subpoena	1.00
October 7, 1952, Jack Coikas, witness fee and mileage..	20.52
October 7, 1952, Lorenzo Marquez, witness fee, mileage	20.52
October 7, 1952, Sheriff of Guadalupe County, serving subpoenas	2.50
October 8, 1952, U. S. Marshal, serving subpoenas....	1.50
Total	<u>\$354.58</u>

S-1-A That plaintiff proceeded in forma pauperis in the United States Court of Appeals for the Tenth Circuit and in the Supreme Court of the United States and that by rea-

son thereof he was exempted from advancing certain costs for which he is now liable as a successful litigant, including \$100 docketing fee in the Supreme Court of the United States and an amount unknown to affiant which was paid by the United States of America to E. E. Greeson, reporter for this court, for the transcript on appeal.

That plaintiff requests that said items heretofore paid and said items for which he is liable as a successful litigant be taxed as costs in this action.

DEE C. BLYTHE.

Sworn to and subscribed before me this 6th day of November, 1952.

(Seal)

JAMES A. HALL,
Notary Public in and for
Curry County, New Mexico.

My commission expires: April 12, 1956.

[Proof of service on original.]

Filed in U. S. District Court November 8, 1952. Filed in U. S. Court of Appeals, Tenth Circuit, as part of supplemental record. March 28, 1953.

Motion for Judgment and in the Alternative
for New Trial.

50 1. Comes now Mead's Fine Bread Company, defendant in the above styled and numbered cause and respectfully moves the court that the verdict of the jury be set aside and that judgment be entered for this defendant denying recovery to the plaintiff upon the following grounds:

a. The plaintiff has failed to show that the transactions of which complaint is made were in interstate commerce within the meaning of the Clayton Act as amended by the Robinson-Patman Act; that on the contrary the pleadings and evidence show conclusively that the complained of acts were wholly local in character having no impact upon such commerce or budrening the same.

b. The plaintiff has failed to show that the transactions of which complaint is made were in interstate commerce within the meaning of the Clayton Act as amended by the Robinson-Patman Act; that on the contrary the evidence in this cause shows conclusively that no harm resulted to the public and that the same had no effect upon the flow of commerce between the several states.

e. The court erred in denying this defendants motion to direct a verdict in its favor at the close of plaintiffs case and at the close of all the evidence for the following reasons:

(1) That there was no substantial evidence that this defendant was engaged in commerce within the meaning of the act at any of the times in question.

51 (2) That there is no substantial evidence that this defendant was acting in the course of commerce, either directly or indirectly in the sale of goods between purchasers of any commodity.

(3) That there is no substantial evidence that there was a discrimination in price between different purchasers of commodities of like grade and quality.

(4) That there is no substantial evidence that any of the purchases involved in the alleged discrimination were in commerce.

(5) That the evidence conclusively shows that the sales complained of by the plaintiff would not have the probable effect substantially to lessen competition or tend to create a monopoly in any line of commerce or injure, destroy or prevent competition with any person who either grants or knowingly receives the profit of such discrimination or with customers of either of them.

(6) The evidence in this case shows that the sales complained of were made in response to changing conditions affecting the market for and the market ability of defendants goods.

(7) That the evidence of the plaintiff conclusively shows and plaintiff admits that the defendant was justified in selling its bread at the reduced price for the reason that the plaintiff admits that the defendant reduced its wholesale

prices of bread for the purpose of combating the boycott on the part of the merchants and that such sales have been justified as a matter of law.

(8) That the plaintiff has failed to show any compensable damage for the reason that his own testimony establishes beyond reasonable doubt, the plaintiff inflicted any injury that he may have suffered upon himself by reason of his failure to stop the boycott and that under the law, the plaintiff was under a duty to exercise all reasonable means in his power to mitigate his damage.

(9) That the plaintiff's cause of action is by his testimony alone established to be nothing more than a complaint that his only competitor should not be permitted to compete with him on an equal basis.

(10) That the plaintiff failed to establish commerce within the meaning of the action in so far as he relies upon common ownership, interlocking directorates, common advertising program, purchase arrangements and trade name.

(11) For the reason that plaintiff failed to establish by substantial evidence:

(a) That plaintiff would have made a profit at any time about which complaint is made in the absence of the price cut.

(b) That plaintiff lost or failed to make a profit he would have made in the absence of the price cut.

(c) Facts or circumstances from which the jury could reasonably calculate any amount of profits lost by plaintiff as a result of the acts complained of.

(12) The plaintiff has failed to establish by any evidence that any recoverable injury was proximately caused by any unlawful act of defendant.

(13) The plaintiff has failed to establish any facts upon which recovery may be had for loss or damage to plant or plant properties.

2. Comes now the defendant Mead's Fine Bread Company and respectfully moves the court for order setting aside the

verdict of the jury and grant it a new trial upon the following grounds:

53 a. The verdict of the jury is contrary to the law.

b. The verdict of the jury is contrary to the evidence.

c. The verdict of the jury is contrary to the law and the evidence.

d. The verdict of the jury is contrary to the weight of the evidence.

e. The verdict of the jury is contrary to the law and the evidence in that there is no substantial evidence that the plaintiff suffered any injury in his business or property by reason of anything forbidden by the Act upon which plaintiff bases his suit.

f. The verdict of the jury is contrary to the law and the evidence in that the plaintiff has failed to prove by admissible and substantial evidence injury to his business or property.

g. There is no substantial evidence supporting the amount of damages assessed by the jury's verdict for lost profits, or damages or loss to plaintiff's property.

h. The verdict of the jury is excessive and beyond all conscious reasoning and given under the influence of passion and prejudice.

i. There is no substantial evidence to support the amount of damages assessed by the jury's verdict.

j. The verdict of the jury is contrary to the law and the evidence for the reason that the evidence in this cause shows conclusively that any injury or loss suffered by the plaintiff, if any there be, were self-inflicted and proximately caused by plaintiffs acts and not the acts of this defendant.

k. The court erred in denying this defendants motion to direct a verdict in its favor made at the close of plaintiff's case and at the close of all the evidence for the reasons set forth in said motion the substance of which is set forth in paragraph 1c above.

54 l. The court erred in submitting the cause to the jury over the objection of this defendant that the plaintiff failed to establish by substantial evidence that this defendant was engaged in commerce at any of the times in question.

m. The court erred in submitting this cause to the jury over the objection of this defendant to the effect that the plaintiff failed to establish by substantial evidence that the purchases involved were in interstate commerce.

n. The court erred in submitting this cause to the jury over the objection of this defendant that the plaintiff failed to establish that the commodities involved in the alleged discriminations were of like grade and quality.

o. The court erred in submitting this cause to the jury over the objection of this defendant that the plaintiff failed to establish by substantial evidence interstate commerce by reason of common ownership of stock and interlocking directorates.

p. The court erred in including in its charge instruction upon and requiring or *permitting* a finding on loss of profits over the objection of this defendant that the plaintiff had neither pleaded nor proved by substantial evidence lost profits.

q. The court erred in including in its charge, over the objection of this defendant, instruction upon and requiring or permitting the jury to find and assess damages resulting from alleged acts of the defendant committed after the date of commencement of plaintiffs action.

r. The court erred in including in its charge, over the objection of this defendant, instructions upon and requiring or permitting the jury to find and assess damages arising at a time when the purchases involved in the alleged discriminations were not in interstate commerce, including the period between September 3, 1948 and December 23, 1948.

s. The court erred in including in its charge, over the objection of this defendant, instructions upon and requiring or permitting the jury to find and assess damages occurring, if any, after the defendant raised its prices.

55 t. The court erred in including in its charge, over the objection of this defendant, instructions upon and requiring or permitting the jury to find and assess damages for loss of value of plaintiffs plant in the absence of proof of loss by evidence as to the reasonable market value before and after the alleged wrongful acts of the defendant.

u. The court erred in permitting, over the objections of this defendant, the jury to take into consideration loss of goodwill in assessing damages in the absence of substantial evidence of the value of such good will before and after the alleged wrongful acts.

v. The court erred in its instructions and charge to the jury on the question of damages in that it permitted the jury, over the objection of this defendant to take into consideration and speculate on matters of loss or injury not recoverable and matters of loss not plead or proved.

w. The court erred in its instructions and charge to the jury on the question of damages in that it permitted the jury, over the objection of this defendant, to take into consideration and speculation losses that may have accrued to the plaintiff by reason of new business adventures by the plaintiff after and during the time for which recovery is sought.

x. The court erred in declining defendants request for charge as follows:

(1) The court erred in refusing defendant's requested instruction no. One (1), which was as follows:

56 "The evidence in this case shows and it is admitted that all but one of the grocery merchants in the City of Santa Rosa agreed to and executed an instrument whereby said merchants agreed among themselves that they would not purchase bread or any other bakery products from anyone except the plaintiff, Moore. The evidence further shows that all the merchants, except one, did boycott the defendant Mead's Fine Bread Company by refusing to buy its bread and bakery products. After the boycott became effective, the defendants, Mead's Fine Bread Company, reduced the price of bread only and only in the City of Santa Rosa and sold it at the reduced price in the City of Santa

Rosa from September 3, 1948 to April 26, 1949. No reduction of prices on bakery products other than bread was made by defendant and prices on bread and other bakery products sold by it outside of Santa Rosa in competition with the plaintiff remained normal."

"Under the federal law of this case, it is unlawful for any person or corporation engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce where such commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or insular possessions or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them.

57 "There are exception, however, to this rule and under certain circumstances a person or corporation engaged in commerce is justified in selling his or its products at one price in one place and at another price in another place.

"In this case it is admitted and has been shown that the defendant Mead's Fine Bread Company, did not lower the price of its bread in Santa Rosa, New Mexico until after the boycott became effective; and if you find that the defendant sold its bread at the reduced price in good faith solely to break the boycott, your verdict should be in favor of the defendant, because it will have been deemed under the law to have justified the sale of its bread at the reduced price and you will find for the defendant."

(2) The Court erred in refusing Defendant's requested instruction No. Two (2), which was as follows:

"You are instructed that the monopoly of the bakery business in Santa Rosa sought by the merchants for plaintiffs benefit was an unlawful undertaking and profits the plaintiff expected to make from such unlawful undertaking are not

recoverable and you will not take them into consideration. You will only take them into consideration. You will only take into consideration such profits, if any, as the plaintiff might reasonably expected to derive from the sale of his bread in Santa Rosa in open and fair competition with the defendants products had the defendant not reduced the prices."

58 (3) The court erred in refusing defendant's requested instruction No. Three (3), which was as follows:

"You are instructed that no recovery can be had by plaintiff for losses, if any, he might have sustained which could have been prevented by him by the exercise of reasonable efforts. You are therefore charged that if you find from a preponderance of the evidence that the defendant would have restored its former prices immediately upon the termination of the monopoly, and that the plaintiff knew or should reasonably have known that the defendant would do so, and if you further find that the plaintiff could, with reasonable effort, have terminated the monopoly and that he failed to do so, then you will not allow damages for loss of profit after such time as plaintiff could have terminated the monopoly."

(6) The court erred in refusing defendant's requested Instruction No. Six (6), which was as follows:

"You are instructed that if you find that the plaintiff failed to conduct his business with reasonable skill and diligence during the time which the court by its charge permits recovery of damages, if any, you will not take into consideration losses directly and proximately caused by the failure of the plaintiff to conduct his business with reasonable skill and diligence."

(7) The court erred in refusing defendant's requested instruction No. Seven (7), which was as follows:

"You are instructed that under the law of this case the plaintiff may not recover for injury or losses solely caused by his own acts and you will not take into consideration in arriving at your verdict such injuries or losses the plaintiff sustained solely caused by his acts."

60 y. This defendant further moves the court for new trial upon grounds in the nature of newly discovered evidence and for the reason that the verdict of the jury is based upon evidence which was false. The plaintiff testified under oath upon trial of this cause that Square Deal Market and Moise Brothers Store were customers of this defendant prior to date of commencement of the boycott, and the witness E. E. Corcorran, Vice President of this defendant testified that said two stores were customers of this defendant prior to the date of the boycott. The plaintiff then produced the witness Lorenzo Marquez, owner of Square Deal Market, who testified under oath that he was not a customer of this defendant prior to the time of the boycott. Plaintiff then produced the witness Milton Moise, one of the owners of Moise Brothers Store, who testified under oath that Moise Brothers Store was not a customer of this defendant prior to the time of the boycott; that the testimony of both Lorenzo Marquez and Milton Moise was false and this defendant attaches to this motion sworn affidavits of the following named and identified persons bearing witness to the falsity of the testimony of these two witnesses, to-wit:

1. Clifford Folks, who at the time in question delivered the defendant products to Square Deal Market and Moise Brothers Store.

2. Rosa Romo, who was an employee of the witness Lorenzo Marquez and Square Deal Market at the time in question.

3. Zoilo C. Serrno, an employee of Milton Moise and Moise Brothers at the time in question.

4. Joe L. Gutierrez, an employee of the witness Lorenzo Marquez and Square Deal Market at the time in question.

5. Gene L. Gutierrez, an employee of the witness Lorenzo Marquez and Square Deal Market at the time in question.

The plaintiff through this scheme of deceit and fraud sought to and did reflect upon the honesty and integrity of this defendant and its witnesses, and at the time he left himself in a generous attitude before the jury, knowing full well the falsity of the testimony and knowingly taking advantage thereof. The resulting damage and harm to this defendant is

reflected by the jury's verdict, and defendant says that such false testimony did result in irreparable damage and
61 harm to it, that the same did unfairly and unjustly influence the jury in its verdict against it upon all issues, and that in the absence of such false testimony the verdict of the jury would have probably have been for the defendant. Defendant further says that it had used due diligence at all times in making discovery of the true facts in the cause and in their presentation to this court.

Wherefore, Defendant prays the court that the verdict of the jury be set aside and that judgment be entered for it denying all recovery sought by the plaintiff and in the alternative that if its motion for *judgement* be overruled that the verdict of the jury be set aside and that it be granted a new trial and for such other relief defendant may show itself justly entitled.

Respectfully submitted,

Howard F. Houk,
Attorney at Law.

Edward W. Napier,
Attorney at Law.

Attorneys for the Defendant,
Mead's Fine Bread Company.

By Edward W. Napier.

[Proof of service on original.]

Filed with exhibits November 26, 1952.

October 11, 1952.

62 My name is Clifford Fowlkes and I live at 309 South First Street in Tucumcari, New Mexico. I am 39 years of age, married and have a family. At present I am employed by Crescent Creamery in Tucumcari, New Mexico.

I was first employed as a driver-salesman in Tucumcari by Mead's Fine Bread Co. located in Clovis, New Mexico. I worked in and around Tucumcari for about a week and then took over Mead's Fine Bread Company's Santa Rosa, New

Mexico, route. This occurred in the spring of the year of 1948. When I started selling Mead's Fine Bread in Santa Rosa the wholesale price was 14 cents on the one pound loaf and that was the price which I sold it until the price was cut. I was instructed to cut the price in one-half about two months after I took over the Santa Rosa route. The price was cut only in Santa Rosa, New Mexico. Before the price was cut I was selling Mead's Fine Bread and cakes to Square Deal Grocery in Santa Rosa, New Mexico. I had been selling *Break* and cakes to Square Deal Grocery continuously until they quit taking Mead's Fine Bread along with nearly every other merchant in town. They all quit the same day.

Mr. Marquez was the owner of Square Deal Grocery at the time I was selling bread. I am not sure of the spelling of the name Marquez but it was something like that. There was a blond haired girl about 25 years of age that checked *by* bread and paid me for it just about every day. Once and a while Mr. Marquez would check my deliveries of bread and cakes and pay me for it. All sales were by cash. I sold Mead's Fine Bread and cakes to Square Deal Grocery in Santa Rosa, New Mexico, for about two months. After they quit buying from me, I never did sell Square Deal Grocery again.

Clifford Fowlkes.

Sworn to and Subscribed to before me this the 11th day of October, 1952.

Fred White,
Justice of The Peace,
505 South Third,
Tucumcari, N. M.

October 11, 1952.

63 I wish to add the following to the statement I made concerning the sale of Mead's Fine Bread and cakes in Santa Rosa, New Mexico. I sold Meads Fine Bread and cakes to Moise Brothers Grocery prior to the time the price of Bread was cut. I was paid each day for the bread and cakes I left at a cage like office in the back of the store. I

sold Mead's Fine Bread and cakes to Moise Brothers Grocery for about two months.

Clifford Fowlkes.

Sworn to and Subscribed before me this the 11th day of October, 1952.

Fred White.

Justice of the Peace,

505 South 3.

October 11, 1952.

64 My Name is Miss Rosa Romo, I am 27 years old and I live at 403½ E. Manhattan, Santa Fe, New Mexico. I am now employed by the State of New Mexico, in The State Tax Commission. I have been working for the Commission since August 1, 1950.

Prior to that time I was employed by Mr. Marquez, at the Square Deal Market, Santa Rosa, New Mexico, Mr. Marquez's full name is Lorenzo A. Marquez. I worked for Mr. Marquez in Square Deal Market at Santa Rosa, New Mexico beginning about the year 1944 or 1945, and continued to work for him in the Square Deal Market until about a month before moving to Santa Fe, New Mexico in July, 1950. My employment at the Square Deal Market was *continues* during the entire time of about six years.

I recall when Mead's Fine Bread Company first sold it's bread in Santa Rosa, New Mexico. Their bread was wrapped in a yellow wrapper with the words Mead's *Find* Bread printed on it. We sold Mead's Fine Bread in the Square Deal Mkt. at Santa Rosa, New Mexico until about the time the merchant's decided to quit buying Mead's Fine Bread and to buy only Moore's Bread. Mr. Marquez bought Mead's Fine Bread and pastry and sold it in the Square Deal Market for several months before the merchant's quit buying Mead's

65 Fine Bread. Mr. Ramon Fox, was the salesman for Mead's Fine Bread in Santa Rosa, New Mexico. I remember him coming in the store nearly every day and leaving Mead's Fine Bread and pastry on the bread rack in

the Square Deal Market. Mr. Fox was a good customer of the Square Deal Market and Mr. Marquez bought Mead's Fine Bread from him.

When the merchant's decided to stop buying Mead's Fine Bread, Mr. Marquez along with the owners of O. K. Store and People's Store stopped buying Mead's Fine Bread. I remember that the bread rack in the Square Deal Market was divided equally between Moore's Bread and Mead's Fine Bread.

During the six years I worked for Mr. Marquez, I was employed as Cashier and Clerk, my duties *included* selling of bread and other groceries and checking them after the customers had made their selection and accepting payment for the bread and other groceries purchased.

I have typed this statement myself (consisting of two pages) and everything stated is true and I have been sworn to the truth in making this statement.

Rosa Romo.

Sworn to and subscribed to before me the undersigned Notary Public, this the eleventh day of October, 1952.

(Seal)

Velma P. Dowdy,

Notary Public, Santa Fe County,
New Mexico.

My Commission expires January 6, 1953.

Affidavit

State of New Mexico, ss:

County of Guadalupe.

66 Z. C. Serrno, being first duly sworn upon his oath states that he is a resident of the Town of Santa Rosa, Guadalupe County, New Mexico.

That he was employed by Moise Brothers Grocery at Santa Rosa, New Mexico in 1948 at the time Moise Brothers and other merchants of Santa Rosa had a meeting and agreed to

use Moore's bread only. At that time Moise Brothers was using Mead's Fine Bread.

It was at about the same time, while I was still employed by Moise Brothers, that Mead cut the price of bread.

Zoilo C. Serrano,
Affiant.

Subscribed and sworn to before me this 7 day of November, 1952.

(Seal)

Paulita Baca,
Notary Public.

My commission expires: September 27, 1952.

67 My name is Joe L. Gutierrez and I live at Santa Rosa, New Mexico. I am 32 years old, married, and am a butcher by trade. I went to work at Square Deal Market in Santa Rosa, N. M., in May of 1946 as a butcher. My employment there has been continuous at all times since and am still so employed at Square Deal Market in Santa Rosa.

The bread rack in Square Deal Market is located directly in front of my meat counter. I don't remember the date Mead's Fine Bread was first sold in Square Deal Market but some time before the merchants held a meeting at Medleys where it was decided not to handle Mead's Fine Bread any more. We started handling Mead's Bread. The day they first sold their bread to Square Deal Market Mead's brought in a cardboard box of small sample loaves of Mead's Fine Bread. Mead's bread was sold in Square Deal Market that day and we continued to handle it until the merchants held their meeting and agreed not to buy Mead's bread and handle only

Moore's bread. Mr. Marquez, the owner of Square Deal at that time, came back from the merchant's meeting and told me that everyone else had agreed not to handle any bread other than Moore's bread and that we would not buy any more Mead's Fine Bread. Mr. Marquez did not buy any more of Mead's bread until Mr. Moore closed his

68

bakery in Santa Rosa at which time Mr. Marquez started handling it again. We are still handling Mead's Fine Bread at this time.

Mr. Marquez's full name is Lorenzo A. Marquiz.

I remember a Mrs. Cunningham whose husband worked as a surveyor for the State Highway Department. Right after Square Deal Market stopped handling Mead's Fine Bread, Mrs. Cunningham kept asking me why we did not handle Mead's Fine Bread any more. I explained to her that I did not have anything to do with it, that I just worked there. She said she would go buy it at Ernie's Grocery. Before Square Deal Market stopped handling Mead's Bread Mrs. Cunningham bought Mead's Fine Bread from us. I don't remember Mrs. Cunningham's husband's first name or initial nor do I know where they are now (Two years ago in Los Alamos.)

69 Mr. Marquiz sold Square Deal Market to Pelaigo Compos in 1951. They are brother-in-laws.

I have read the foregoing statement consisting of three (3) pages and the facts therein stated are true.

October 12, 1952.

Joe L. Gutierrez.

Sworn to and subscribed before me, a Notary Public on this the 12th Day of October, 1952.

(Seal)

C. J. Webb,
Notary Public,

Guadalupe County, New Mexico.

My commission expires February 10, 1953.

70 My name is Gene L. Gutierrez and I am 16 years of age. I am now attending High School in Santa Rosa, New Mexico. I can be reached through my brother, Joe L. Gutierrez, at 244 North 3rd Street in Santa Rosa or Box 55.

I started working for my brother, Joe L. Gutierrez in Square Deal Market in Santa Rosa, New Mexico, at the same time my brother started. That was in May of 1946. He was teaching me to be a butcher also.

I remember when Mead's Fine Bread Company first sold its bread in Square Deal Market. It was a long time ago. I was about 12 years old. The Mead's salesman brought in a box of small sample size loaves of bread and gave me some that day. There was a lot of children in the store that day fighting for the little loaves of bread. I do not remember the salesman's name but he was the one that sold Mead's bread just before Jimmy Holloman worked for Mead's as a salesman. I *rember* kidding with him a lot trying to get some more of the little loaves of bread. About two or three months after we started selling Mead's Fine Bread in Square Deal Market, Mr. Marquez stopped *handeling* it. Several other of the grocerymen in Santa Rosa also quit selling Mead's bread. We started selling Mead's Fine Bread again about the time Mr. Moore went out of business.

I have been working in Square Deal Market in Santa Rosa before and after school hours, on Saturdays and during the summer ever since I started in May of 1946.

I have read the foregoing statement and it is true. October 12, 1952. This statement consists of two pages.

Gene. L. Gutierrez.

Sworn and subscribed before me a Notary Public this the 12th day of October, 1952.

(Seal)

C. J. Webb,
Notary Public,

Guadalupe County, New Mexico.

My commission expires February 10, 1953.

Order Overruling Motion for Judgment and in the
Alternative for New Trial.

72 This matter having this day come on before me for hearing pursuant to defendant's Motion for Judgment and in the Alternative for New Trial, and the Court having heard the argument of counsel, and being well and fully advised in the premises.

It is therefore ordered, that defendant's motion be and the same hereby is denied.

Dated this 8th day of December, 1952.

Carl A. Hatch,
United States District Judge.

Filed December 8, 1952.

Judgment.

73 This cause having come regularly for trial on the 8th day of October, 1952, the plaintiff, L. L. Moore, appearing with his attorneys, Dee C. Blythe, Lynell G. Skarda and Fred M. Standley, and the defendant appearing with its attorneys Edward W. Napier and Howard F. Houk, and a trial by jury having been had, and the jury having on the 10th day of October, 1952, rendered a verdict in favor of the plaintiff and against the defendant for \$19,000.00, and the Court having directed that said sum be trebled as provided by law in such cases and having ordered judgment in accordance with said verdict trebled, for attorney fees in the sum of \$11,400.00, and for plaintiff's costs herein;

Now, therefore, it is adjudged that the plaintiff do have and recover from the defendant the sum of \$68,400.00 with interest thereon from the date hereof at the rate of six (6) percentum per annum, together with his costs.

Dated this 8th day of December, 1952.

Carl A. Hatch,
United States District Judge.

Filed December 8, 1952.

Motion for New Trial.

74 Comes now Mead's Fine Bread Company in the above styled and numbered cause and respectfully moves the court to set aside the verdict of the Jury and that the judgment entered on the verdict be vacated and set aside and that a new trial be granted the defendant for the following reasons:

I.

Comes now the defendant and adopts and renews its Motion to Set Aside the Verdict of The Jury And For Judgment And In the Alternative For New Trial, heretofore filed herein and respectfully prays that the previous order entered overruling such motion be reconsidered and that the verdict of the jury be set aside and that the *judgement* entered on the verdict be vacated and set aside and that this defendant have *judgement* denying recovery to the plaintiff or in the alternative be granted a new trial for the following reasons which were specified in its original motion above mentioned, to-wit:

[The language which follows is identical with that set out in the motion for judgment or new trial, filed November 26, 1952 (printed pages 16 to 25) with the exception that the dates set out in subparagraph "r" (printed page 20) read "September 3, 1948 and December 26, 1948" in this motion.]

II.

84 Comes now the defendant Mead's Fine Bread Company without waiving the foregoing motion, after entry of *judgement* in this cause and within the time provided by the rules of court and respectfully moves the court to set aside the *judgement* entered in this cause and a new trial be granted for the following reasons: to-wit:

1. The attorneys' fee allowed plaintiff is without support in the evidence and ought not to have been allowed.

2. In the alternative without waiving the foregoing, the attorneys' fee allowed plaintiff in its *judgement* is excessive and unreasonable.

3. The amount allowed by the court for attorneys' fee is excessive and unlawful for the reason that the trial court included in the amount a sum to cover attorney's fee "because the case will be appealed by the defendants to the Court of Appeals and probably the Supreme Court."

85 4. The sums allowed the plaintiff for expense of suit was without support in the evidence.

5. The sums allowed the plaintiff for expenses was excessive and unreasonable.

Respectfully submitted,

Howard F. Houk,
Attorney at Law.

Edward W. Napier,
Attorney at Law.

Attorney's for the Defendant,
Mead's Fine Bread Company.

By Edward W. Napier.

[Proof of service on original.]

Filed with exhibits December 13, 1952.

[The affidavits attached to the above motion are identical with those attached to the motion for judgment or new trial (printed pages 25 to 31).]

Order Overruling Motion For New Trial

96 On this the 27th day of December, 1952, came on to be heard Defendant Mead's Fine Bread Company Motion to Set Aside Verdict of the Jury and Vacate *Judgement* and for new trial.

It is ordered that the motion be denied.

Carl A. Hatch,
United States District Judge.

Approved: Fred M. Standby.

Filed December 27, 1952.

Order Taxing Costs.

S-4 This matter having come on regularly for hearing on December 8, 1952, pursuant to plaintiff's Notice of

Motion to Tax Costs filed herein, and the court having heard the arguments of counsel and being well advised in the premises.

It is hereby ordered that the following costs and disbursements of the plaintiff, in the total sum of \$355.37, be taxed and allowed, to-wit:

March 8, 1949, U. S. District Court docketing fee . . .	\$15.00
March 8, 1949, U. S. Marshal, service of summons . . .	2.00
March 12, 1949, U. S. Marshal, service of alias summons	2.00
August 16, 1949, Oscar Taylor, taking deposition of Billy O. Mead	12.95
October 7, 1949, Lehn G. Engelhart, mileage and witness fee	12.68
October 7, 1949, U. S. Marshal, service of subpoenas . .	1.50
October 26, 1949, Oscar Taylor, taking deposition of Rex Webster	30.60
December 12, 1949, U. S. District Court, filing notice of appeal	5.00
March 29, 1950, U. S. Court of Appeals, docketing fee . .	25.00
December 26, 1950, U. S. Court of Appeals, certiorari record	4.40
September 22, 1952, U. S. Marshal, serving subpoena . .	.50
September 30, 1952, Lehn G. Engelhart, witness fee . . .	4.00
September 20, 1952, Milton Moise, witness fee	4.00
September 30, 1952, U. S. Marshal, service of subpoenas	1.00
October 7, 1952, Jack Coikas, witness fee and mileage . .	20.52
October 7, 1952, Lorenzo Marquez, witness fee, mileage .	20.52
October 7, 1952, Guadalupe County sheriff, service of subpoenas	2.50
October 8, 1952, U. S. Marshal, service of subpoenas . .	1.50

The following items for which plaintiff, having prosecuted former appeals in this action in forma pauperis, will be liable as a successful litigant:

Docketing fee waived by U. S. Supreme Court100.00

Cost of transcript paid by the United States 89.70

Dated this 27th day of December, 1952.

Carl A. Hatch,
District Judge.

Filed in U. S. District Court December 27, 1952. Filed in U. S. Court of Appeals, Tenth Circuit as part of supplemental record, March 28, 1953.

Notice of Appeal.

97 Notice is hereby given that Mead's Fine Bread Company, Defendant in the above styled and numbered cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final *judgement* in all of its particulars including assessment of damages and attorneys fee entered in this action on the 8th day of December, 1952 and the order of the Honorable Trial Court assessing defendant with expense and cost of suit.

Respectfully submitted,

Howard F. Houk,
Attorney at Law.

Edward W. Napier,
Attorney at Law.

Attorneys for Defendant,
Mead's Fine Bread Company.

By Edward W. Napier.

Filed December 27, 1952.

[An appeal bond was filed December 27, 1952.]

Transcript of Evidence.

October 8, 1952.

103 Before: Honorable Carl A. Hatch, Judge, and Jury.

Appearances: Dee C. Blythe, Esquire, Lynell Skarda, Esquire, and Fred M. Standley, Esquire, Clovis, New Mexico, for the plaintiff. Edward W. Napier, Esquire, Myrick Building, Lubbock, Texas, Howard Houk, Esquire, Santa Fe, New Mexico, For the defendant.

104 (The parties announce ready for trial.)

(Jury empaneled and sworn to try the case.)

The Court: Call your witnesses.

(All witnesses present sworn.)

The Court: Do you want the rule?

Mr. Napier: Yes, sir, we call for the rule.

The Court: The rule has been requested, which means that the witnesses will have to go out of the court room and remain outside during the taking of testimony. You will not discuss the case, or what your testimony is going to be, or what it has been with anyone except the attorneys in the case. You will remain outside where you can be called when wanted. This doesn't apply to the parties to the action. The others will go outside.

Does the plaintiff desire to make an opening statement?

Mr. Blythe: If it please the Court.

(Opening *statment* by Mr. Blythe.)

The Court: (Interrupting) Mr. Blythe, that is entirely inadmissable. The Jury has nothing to do with any former trial of this case.

You will disregard the statement of the attorney entirely in arriving at a verdict in this case, Members of the Jury. You are not concerned with what has gone on before

105 at all. You will only be concerned with the issues presented in the trial of this case.

Mr. Blythe, you will confine yourself to an opening statement of the facts; what you expect to prove. Proceed.

(Further opening statement by Mr. Blythe.)

The Court: Do the defendants desire to make an opening statement now or later?

Mr. Napier: I believe I would like to make it now, Your Honor.

The Court: Proceed. And you also confine yourself to a statement of the facts. Don't go into the law or anything except what is proper in an opening statement.

Mr. Napier: Yes, sir.

(Opening statement by Mr. Napier.)

Mr. Blythe: If the Court please, the plaintiff will object to this opening statement—.

The Court: I sustain the objection. The feeling of the parties has nothing to do with an opening statement. The only purpose of an opening statement is to give to the Jury what you expect to prove.

Mr. Blythe: If the Court please, the plaintiff would like to renew the objection to this line of statement by the counsel for the defendant in that he is trying to bring before the Jury a matter that will be inadmissible under the law of this case as decided previously. That is this so-called justification.

106 The Court: He may state what he expects to prove, but confine it strictly to that.

(Reporter's note: Counsel objected to the statement by counsel that defendant felt justified in lowering the price of bread because of the boycott.)

(Further opening statement by Mr. Napier.)

The Court: Before we begin examination of the witnesses, there is a rule in force in this court that may not be familiar to counsel in the case. That is, first of all, in the examination of witnesses you will confine yourself to direct-examination,

cross-examination, and re-direct-examination. No re-cross-examination is permitted. Moreover, the party examining the witness, the attorney examining the witness, completes his examination without retiring to the tables or corner of the court room and holding conferences with his associate counsel. When the attorney leaves the stand, he is through with the witness. If associate counsel desire to make suggestions, they may send them up by written notes or memoranda. But consultation by the attorneys—I enforce that rule simply as a matter of expediting the trial of the case. It takes too long for an attorney to leave the stand and go and talk with his associates. I mention it merely, gentlemen, so that you will understand the procedure.

Call your first witness for the plaintiff.

109 L. L. MOORE, the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Blythe.

Q. State your name.—A. L. L. Moore.

Q. Are you the plaintiff in this case, Mr. Moore?—A. Yes, sir.

Q. Where do you live?—A. At present I live in Artesia, New Mexico.

Q. Where did you live in 1948 and '49 and the early part of 1950?—A. Santa Rosa, New Mexico.

Q. And what business were you engaged in, Mr. Moore?—A. The baking business.

Q. What was the name of your establishment?—A. Moore's Bakery.

Q. Are you now engaged in the baking business?—A. No.

Q. What is your occupation at present?—A. At present I am driving a gasoline truck.

Q. How long did you engage in the baking business?—A. About eighteen years.

Q. In what capacity did you engage in that business?—R. Well, largely wholesale, but retail, too.

Q. When did you first enter the baking business in Santa Rosa, New Mexico?—A. July 1940.

Q. How long did you remain in business there at that time?—A. I remained until I was drafted in the army January the 10th, 1943.

Q. When did you get out of the army?—A. December the 19th, 1945.

Q. Then what did you do in respect to an occupation?—A. I returned to Santa Rosa and reopened my bakery.

Q. What equipment did you have when you reopened your bakery?—A. I had the original equipment I opened with in 1940.

Q. Where did you purchase that equipment?—A. I bought it from Eddie Jay of Hamlin, Texas.

Q. Will you tell us what that equipment consisted of?—A. It consisted of a 72-loaf Superior butane-fired gas oven and a slow-speed mixer, and junior-type Champion dough break. And then the Master bread-slicer and sealer. And two show cases, and bread pans and bun pans, and miscellaneous handling tools.

Q. What did you pay for that equipment?—A. I paid—
111 Mr. Napier: If it please the Court, we would like to insist at this time that the plaintiff avoid going into any question of damages until he has proven the conditions precedent to a recovery in this case.

The Court: I assume these questions are largely preliminary in nature. I don't suppose he is going into the question of damages at this time. I will overrule the objection now. Proceed, Mr. Blythe.

Mr. Napier: Thank you, sir.

Mr. Blythe: If the Court please, I believe the jurisdictional question stands admitted in this case. I had intended to go into the matter of damages with this witness.

The Court: Well, proceed. Now, Mr. Blythe. I haven't read the amended pleadings with that in mind. Do you mean by jurisdictional matters the interstate commerce aspects of this transaction?

Mr. Blythe: Yes, Your Honor.

The Court: Is that admitted, Mr. Napier?

Mr. Napier: No, sir.

The Court: There is an issue on that.

Mr. Napier: Yes; definitely.

The Court: All right. Proceed, Mr. Blythe.

Q. Mr. Moore, did you answer the question as to what you paid for this equipment you have been describing?—

112 A. Three thousand dollars.

Q. Is that the equipment bought from Eddie Jay?—A. Yes, sir.

Q. And that is the equipment with which you resumed business when you came back from the army; is that right?—A. Yes, sir.

Q. Who were your competitors in the baking business at Santa Rosa at that time?—A. Purity Bakery out of El Paso was shipping bread in by train.

Q. When did you start your business up again, what date, if you recall?—A. February the 1st, 1946.

Q. Did you have a lease on the premises you occupied there?—A. Yes, sir.

Q. When was that lease signed and for how long was it to run, if you recall?—A. It was—At the time—February the 1st, 1946, and there was a five-year lease, which makes it February the 1st, 1951.

Q. Do you now have that lease?—A. No, sir, I haven't.

Q. From whom did you lease the property?—A. Mrs. Bonnie Lucero.

113 Q. Have you made an effort to secure a copy of that lease?—A. Yes, sir.

Q. Have you been successful?—A. No, sir.

Q. Now, what is your accounting period for income tax purposes?—A. From February the 1st until January the 31st of the next year.

Q. You later bought—Strike that. State whether or not you later bought any other equipment.—A. Yes.

Q. State what the items were, approximately when you bought them, and what their cost was.—A. I bought a trap—. Just a moment.

Mr. Napier: We will object to this line of testimony, Your Honor, for the reason that the condition precedent to recovery in this character of case has not been laid. And now commerce—.

The Court: (interrupting) Ordinarily counsel is correct in his objection. The order of proof is largely a matter of discretion, and I think counsel is laying a foundation and getting all these preliminary matters in before getting to the question of damages. Is that your purpose, Mr. Blythe?

114 Mr. Blythe: Yes, Your Honor, it is.

The Court: I will permit you to do that. Go ahead. Objection overruled.

Q. Proceed, Mr. Moore.

The Court: Do you remember the question?

A. Yes, sir.

The Court: All right. Proceed.

A. I bought a triple high-speed dough mixer, barrel and a half size, and a Hasty automatic slicing and raising machine, and a Century dough divider, which divides dough into loaves; and a Century roller, and Thompson molder, which is used to mold the loaves.

Q. When did you buy that equipment and what did it cost?

—A. I bought it in 1946, I forget the month, but it cost thirty-five hundred.

Q. Where did you buy it from?—A. Littlefield, Texas.

Q. Now, with reference to the calendar year 1947, did you buy any additional equipment in that year?—A. Yes, sir.

Q. Will you state what the items were, where you bought them and what the cost was?—A. I bought a Master baking oven, 24-pound pan size, which holds 216 loaves of
115 bread. I bought a Chevrolet delivery truck. And I bought pans to go—five ovensful of pans, I bought bun pans, I bought bread racks, racks used to put bread on for cooling and storing. And I bought the dough trolls, those are more easily explained as a trough, large trough the bread sits in to rise and ferment.

Q. Are those the major items, Mr. Moore?—A. Those are the major items I bought. There was other items bought at different times.

Q. What did you say was the capacity of the oven you bought?—A. 216 pound loaves.

Q. How did it compare in capacity with the oven that you

previously operated?—A. Well, the old oven just held 72. It was about three times larger.

Q. Now, you were then expanding the capacity of your business; is that right?—A. Yes, sir, I was buying this new equipment in order to make what we might term as a modern loaf of bread. The bread business changed while I was in the army and there was a demand for this new high-speed loaf of bread. And my shop had to be reequipped before I could make it.

Q. Then by 1947 was your bakery fully equipped to make this new loaf of bread?—A. Yes, sir, just at the end
116 I got all my new pans and ovens set up and was making high-speed bread at the end of the year.

Q. What was the physical value of your plant as of the end of 1947?

Mr. Napier: Your Honor, may we renew our objection that no commerce—.

The Court: Your objection may go to all this line of testimony. Same ruling.

A. \$15,559.34, I believe.

Mr. Napier: May I have those again, please?

A. \$15,559.34.

Q. That was the physical value of the plant, you say?—

A. Yes, sir.

Q. In addition to physical value, are there any intangible values to a business of that sort?—A. Yes, sir, there is a goodwill value.

Q. What did you value goodwill?

Mr. Napier: Your Honor, we object to that for the reason it would be a conclusion of the witness. He hasn't laid a predicate to qualify this man to know what goodwill is. He hasn't defined it. It is highly speculative at best.

The Court: Overruled.

A. Well, I—.

117 Mr. Napier: As to what goodwill he might have. Note our exception.

Q. Answer the question, Mr. Moore.—A. I considered my goodwill worth seventy-five hundred dollars.

Q. As of September the 1st, 1948, what was the value of your business, including the physical plant and the going concern value?—A. \$23,400—May I refer to my notes?

The Court: You may if there is no objection.

Mr. Napier: We object to him testifying from the notes, Your Honor, until he identifies where these figures came from and what source they're taken from.

The Court: All right. Lay the proper foundation.

Q. Mr. Moore, have you made notes from the financial records of your business concerning the matters about which you were questioned here?—A. Yes, sir.

Q. Did you make these notes yourself?—A. No, sir; not alone. I was helped by an auditor.

Q. This auditor doing what for you?—A. He was making my income tax report and summary of my business.

Q. Was this audit made under your supervision?—A. Yes, sir.

118 Q. Are you familiar with the financial data concerning your business?—A. Yes, sir.

Q. You have in your possession such memoranda concerning this financial data?—A. Yes, sir.

Q. Refresh your memory, then, from your memoranda. What was the total value of your business, including the physical plant and the goodwill, as of September the 1st, 1948?—A. \$23,459.34.

Q. Now, you put in the equipment at cost price, have you not?—A. Yes, sir.

Q. I ask you whether or not that equipment had depreciated in value any by September the 1st, 1948.—A. Very, very little.

Q. Would the same equipment be worth more or less now?—A. It would be worth more.

Q. What is the cause of that?—A. Because of the steel shortage, equipment shortage.

Q. Has the price of baking equipment gone up or down?—A. Gone up.

Q. Approximately how much have they gone up over what they were in 1948?—A. What percent?

119 Q. Yes.—A. What percent, do you mean?

Q. Yes.

Mr. Napier: Your Honor, I think that they should lay a predicate here. We object to his testifying to that. It isn't shown he knows what percentage it has gone up or what source of information he is testifying from.

The Court: Do you think the present value of the equipment is proper evidence?

Mr. Blythe: If the Court please, I am attempting to show this equipment hasn't depreciated in value.

The Court: You have asked that question. I don't think the present time is the proper measure. Sustain the objection.

Q. Mr. Moore, I believe you testified you were in the baking business approximately eighteen years?—A. Yes, sir.

Q. Are you familiar with the cost of production of bread in New Mexico?—A. Yes, sir.

Q. Are you familiar with the standards prevalent in the baking trade as to the percentage of gross revenue which you ordinarily would expect to be net profit?—A. Yes, sir.

Q. In the bakery business.—A. Yes, sir.

120 Q. What is that figure?

Mr. Napier: If it please the Court, it hasn't been shown that all bakeries in the area of which he speaks made the same prevailing profit. It isn't shown as of what time.

The Court: The time has not been fixed. Sustain the objection.

Mr. Blythe: I didn't understand the Court's ruling as to time.

The Court: I sustained the objection. I said you hadn't fixed any time whatever.

Q. Are you familiar with what that percentage was in 1948, 1949?

Mr. Napier: We object to that for the same reason, Your Honor; it isn't shown that the conditions were the same all during that period of time.

The Court: He may answer whether or not he was familiar with it during that period of time. That is the question, were you familiar.

A. Yes, sir.

Q. With regard to this year 1948, what was the standard in the baking business at Santa Rosa and eastern New Mexico—Strike that. Are you familiar with—Strike that, too. Are the standards substantially the same, or are they different in different parts of the State of New Mexico, to your knowledge?—A. Well, the standard is about the same.

The Court: I don't quite understand what you mean by standard, Mr. Blythe.

Mr. Blythe: If the Court please, I mean the percentage of gross revenue which may ordinarily be expected to be net profit in the baking business.

The Court: All right. You say they are not the same. Is that your answer?

A. I said they were.

The Court: They were the same?

A. The standards are the same. The standards were about the same.

The Court: All right. By standards, do you understand what he means by standards?

A. I think so.

The Court: All right.

Q. In the year 1948 in New Mexico what was the standard prevalent in the baking industry with respect to the percentage of gross revenue which could be expected to be net profit?

Mr. Napier: If it please the Court, we object to that for the reason that the measure of damage, if any, this
122 party is entitled to is not what someone else makes or what some standard might be, but profits that he might make. The information that counsel is seeking to elicit from this witness forms no legitimate basis from which the jury—.

The Court: You think his testimony should be confined to his own profit?

Mr. Napier: Yes, sir.

The Court: That he was making?

Mr. Napier: Yes, sir. If he is to establish a profit.

The Court: You may establish, Mr. Blythe, the profit of this individual, if any.

Mr. Napier: Now, Your Honor, we will have an objection to that, of course, and we reserve our right to objection to it, if we may, sir.

The Court: Proceed, Mr. Blythe.

Q. Mr. Moore, with regard to this equipment you detailed a while ago, when was it all completely installed?—A. It was all installed the last of 1948. '47. 1947, that's right.

Q. Now, what was the prevailing price of bread, that is, the wholesale price of bread, in Santa Rosa, New Mexico, on or about September the 2nd, 1948?—A. The pound loaf was wholesaling for fourteen cents and the pound and a
123 half loaf for twenty-one cents.

Q. Was that your price at that time?—A. Yes, sir.

Q. Does that apply to what is known as specialty breads, or what kind of bread was that?—A. It was white bread.

Q. Sliced white bread?—A. Sliced white bread.

Q. Is that the major item of your business?—A. Yes, sir.

Q. Did those same prices prevail outside Santa Rosa or not?—A. Yes, sir.

Q. Do you know of your own knowledge how wide an area those prices extended over?—A. All of eastern New Mexico and west Texas.

Q. Now, do you know when the defendant started bringing bread into—into Santa Rosa, New Mexico?—A. Yes, sir.

Q. When was that?—A. January of 1948.

Q. At that time did you have any other competitors?—A. Yes. Chiordi from Albuquerque was coming in. And also Cottage Bakery from Albuquerque was coming in.

Q. When you saw coming in, how were they bring-
124 ing in their bread?—A. Cottage Bakery was coming in with a truck and Chiordi, I understand, was shipping on the bus line.

Q. How did Meads bring in their bread?—A. By truck.

Q. Where did they truck it from, if you know?—A. Clovis, New Mexico.

Q. Do you know what route the truck followed that came to Santa Rosa?—A. It came to Tucumcari and down Highway 66 to Santa Rosa, and then from Santa Rosa to Las Vegas, New Mexico.

Q. What type of truck was it?—A. It was a large van truck that came as far as Santa Rosa and then it was a bob-tailed truck that picked up the bread and carried it on to Las Vegas.

Q. What, if anything, happened to the price of sliced white bread in Santa Rosa, New Mexico, on September the 3rd, 1948?—Yes. I noticed signs on the front of the grocery windows reading that Meads bread was, the pound loaf was ten cents and the pound and a half was fifteen cents, retail.

Q. What was the wholesale price, if you know?—A. The wholesale price was seven cents and eleven cents; seven
125 for the pound and eleven cents for the pound and a half.

Q. Did you or any of the other competitors besides Meads meet that price?—A. No.

Q. How long did those prices prevail?—A. Until April the 26th, 1949.

Q. Were you in competition with Meads in any other places besides Santa Rosa?—A. Yes, sir.

Q. Were you in competition with them at the beginning of this price cutting period?—A. At the beginning of the price cutting period? I don't—September the 3rd, 1948?

Q. Yes.—A. We were in competition in Vaughn and Antonchico and Delia.

Q. Did Meads cut their prices in any of those places?—A. No.

Q. Did they cut them any place besides Santa Rosa, to your knowledge?—A. No.

Q. Now, based on your experience in the baking business, Mr. Moore, particularly in manufacturing bread and selling
126 it wholesale in New Mexico, are you in a position to say of your own knowledge whether or not seven cents a pound loaf and eleven cents a pound and a half loaf of sliced white bread is above or below the cost of production?
—A. It is below.

Q. Do you know that of your own knowledge?—A. Yes, sir.

Q. Were you able to compete at that price?—A. No.

Q. Did you ever attempt to?—A. No.

Q. How long did you remain in the baking business in Santa Rosa?—A. Until the last of February 1951.

Q. Well, how long after this price cutting stopped April 26th, 1949 did you remain in business, about how many months?—A. About thirty months.

Q. How many months? After the price cutting stopped?—A. It stopped in September—April the 26th of 1949—and I remained in business through '49 and until February, the last of February of '50.

Q. Then what happened?—A. I was forced to close up.

Q. Was your business solvent at that time?—A. Yes, sir.

127 Mr. Napier: Your Honor, we object—. Withdraw it.

The Court: What is the purpose of this proof, Mr. Blythe? Can you connect it with the alleged discrimination?

Mr. Napier: If the Court please—.

The Court: This is—. He is testifying now about February 1950.

Mr. Blythe: That is when he went out of business in Santa Rosa, Your Honor.

The Court: And the price discrimination ceased, according to his testimony, on April the 26th, 1949. Am I correct in that?

Mr. Blythe: Yes, Your Honor, but it is our contention his going out of business was a direct result—.

The Court: That is what I asked you, if you could make that connection. You may proceed and see if you can. But it will have to be connected.

Q. What happened to your business, Mr. Moore, when Meads started cutting prices September the 3d, 1948?—A. It immediately began to fall off.

Q. Did it fall off all over the territory you served?—A. No, it was just in the town of Santa Rosa where the cheap bread was selling.

Q. What was the tendency of your business before this price cutting started?

128 Mr. Napier: Your Honor, we object to that for the reason that he is speaking here of the tendency of his business. And may we renew our objection here, Your Honor, that the plaintiff has not established commerce—.

The Court: Well, I have permitted him to go ahead with his proof. Of course, he will have to make a showing.

Mr. Napier: May I make one statement to the Court, please, sir? I believe that the Court will find that the testimony is going to develop along lines other than the Court is under the impression it will develop. And in the testimony with reference to loss of profits and the damage to his business must necessarily tie back to the period in which there is a violation. I rather hesitate to talk too much in the presence of the jury, because I think it is a matter for the Court.

The Court: All right. I have ruled on the objection already. You may proceed. I am permitting him to make—to give his testimony. But I said he must show direct connection. And I am waiting to see what the proof develops. Proceed, Mr. Blythe.

Mr. Blythe: Will you read back the last question, please Mr. Reporter?

The Court: I sustained the objection to the last question where you asked about the tendency.

Mr. Blythe: Yes, sir.

129 Q. Mr. Moore, did your sales of bread in the town of Santa Rosa increase or decrease during the period of the price cutting?—A. They decreased sharply.

Mr. Napier: I see counsel is going to offer something in evidence and I would like to see it before it is exhibited.

The Court: Counsel, approach the desk and let's see what you have.

(Off the record between Court and counsel.)

The Court: Proceed.

Q. Mr. Moore, will you step down from the stand? Now are you familiar with Plaintiff's Exhibit 1?—A. Yes, sir.

Q. I ask you whether or not it was prepared under your direction?—A. Yes, sir.

Q. Would you state what it is?—A. It is a chart showing this line.

Q. You have to describe it by color so that the court reporter can tell.—A. This black line shows the sales, the year before, bread sales, in the town of Santa Rosa by the month during the time of the price cut. And this red line shows from the time the price cutting *my started* my business had fell off during the time of the price cutting on 130 down. And at this time where the price of Meads bread was raised to a standard price, this blue line, shows an increase of my bread sales in the town of Santa Rosa.

Q. That blue line is a broken line, isn't it?—A. Yes, sir.

Q. Starting at what month?—A. Starting April the 26th, the day the price was raised.

Q. What year?—A. 1949.

Q. Now, there are certain— Now, there is some figures at the various points on this graph corresponding to the respective months, Mr. Moore. Would you say what those figures are?—A. Well, in Santa Rosa our business varies largely because of the season and the traffic; the summer traffic is heavy.

Q. That is not my question, Mr. Moore. I mean what do the figures represent.—A. They represent dollars I received from bread sales.

Q. Where?—A. In Santa Rosa.

Q. Bread sales only in Santa Rosa?—A. Bread sales only in Santa Rosa.

Q. Now, what are the figures taken from?—A. 131 From my daily sales slips.

Q. Who took those figures from your sales slips?—A. I employed a lady there in Santa Rosa.

Q. Was it done under your supervision?—A. Yes, sir.

Q. Did you check their accuracy?—A. Yes, sir.

Q. Then it is your testimony these figures on the chart accurately represent the sales of bread at wholesale by Moore's Bakery in Santa Rosa, New Mexico, for the sales represented?—A. They are accurate; yes, sir.

Q. Now, I believe you testified it covers the period of two years; is that right?—A. Well, yes; this was the year before.

Q. Describe it so the reporter can get it. What was the year before?—A. This black line.

Q. Was that the upper line most of the way across?—A. Yes, sir, it continues all the way across.

Q. That is, it starts on the left side above the red line, doesn't it?—A. Yes, sir.

Q. Now, do the lines ever cross?—A. Yes, sir

Q. Where do they cross?—A. They cross in May
132 after the bread price was raised. In April my bread sales crossed the year before and continued up.

Q. Now, I call your attention to the figures of—for the month of September 1947 at the extreme lefthand side of the graph, and the figures for August 1948.—A. Yes, sir.

Q. At the righthand side of the graph. Would you state what the difference is in those two figures. I mean, tell what the figures are.—A. The figure at the left is \$2,112.09. The figure at the right is \$2,460.15.

Q. Then what was the tendency of the bread sales in Santa Rosa, up or down, with respect to the same time of the year?—A. They were up.

Q. Now, will you explain the drops in the lines in the graph as to what causes them?—A. The drops in the lines is due to the seasonal business. February is the slowest month in the year and that is because these lines go down to the bottom for February. And after the summer months come in, they rise.

Q. Do you have similar figures for the period immediately following August of 1949?—A. No, sir; I lost those
133 sales slips when I moved, after I closed up, and was unable to find them.

Q. Do you have any figures on your gross business after that period?—A. Not directly in the town of Santa Rosa. Just business as a whole.

Q. Well, can you say of your own knowledge whether or not your sales of bread in Santa Rosa went up or not after August of 1949?

Mr. Napier: That would invade the province of the jury, Your Honor.

The Court: Overruled.

Mr. Napier: I believe it would be a conclusion of the witness. And the exhibit of the records there, which would be the best evidence.

The Court: Overruled. Answer the question.

A. What is the question again?

The Court: He is asking for your own knowledge.

Q. Do you know of your own knowledge whether or not your bread sales in Santa Rosa went up to their level shown here on this graph after August 1949?—A. They went—.

Mr. Napier: Now, we object to the answer. He is not answering the question.

134 The Court: Well, answer the question whether from your own knowledge you can testify if your bread sales went up after August 1949. Is that the date, Mr. Blythe?

Mr. Blythe: Yes, sir.

Q. Do you have such knowledge, Mr. Moore?—A. Very—.

Q. Tell me first if you know of your own knowledge.—A. Well, in my own knowledge I do.

Q. Yes.—A. But as I say, I lost the sales tickets. My sales went up good until—.

Mr. Napier: We object to his voluntary statements.

The Court: He may answer. I think he is answering it probably.

A. They went up good until this seasonal drop came and, naturally, through the seasonal drop, they dropped down again.

Q. I'll ask you whether or not they continued above the period of the price cutting?—A. Yes, they were above.

Mr. Blythe: I offer Plaintiff's Exhibit 1 in evidence.

The Court: I thought it had been agreed it would be admitted. It is admitted. It was so ordered.

135 Q. Mr. Moore, what was the net profit of your business during the fiscal year beginning February the 1st, 1946, and extending to January the 31st, 1947?

Mr. Napier: We object to this, Your Honor, for the fol-

lowing reasons: the records of the plaintiff would be the best evidence; he hasn't laid a proper predicate for it.

The Court: If he were testifying from records, of course they would be the best evidence. But he is just asking a direct question.

Mr. Napier: We object to it for that reason. The records would be the best evidence. We object to it for the further reason he is attempting here to—. May I renew my objections on the commerce question? He hasn't established commerce.

The Court: Yes.

Mr. Napier: That the records are the best evidence, and the records are in his possession, and this defendant has no knowledge as to what this party will testify to. We haven't been furnished with that information by the plaintiff. We have it from other sources. We have the records here, and if counsel would like to take a look at them, we will be glad to furnish them.

The Court: Overrule the objection. As I understand, they are not calling for testimony from records.

136 Mr. Blythe: No, sir; I am not.

The Court: Answer the question.

A. What is the question?

Q. What was the net income from your business during 1946, that is up to the end of your accounting period, January the 31st, 1947?—A. \$5,059.03.

Q. Is that the—. Strike the question. Do you know of your own knowledge what your net income from your business was during the succeeding twelve months, that is from February the 1st, 1947, to January the 31st, 1948?—A. You mean the net?

Q. Yes, the net profit.—A. It was \$107.00 and some cents.

Q. What year's that for? Do you have in your possession any memoranda to refresh your memory, Mr. Moore?—A. Yes, sir.

Q. After refreshing your memory, what would you say your net income from your business was in the period from February the 1st, 1947, to January the 31st, 1948—A. I don't understand.

Q. Mr. Moore, I am trying to establish net profit from your business from 1946 until the end of this price cutting.

137 The Court: That wasn't the question you asked, Mr. Blythe. You asked him from February 1947 to January 1948, net profits for that period of time. Can you answer the question of your own knowledge?

A. I can't at this time; no, sir.

The Court: Proceed.

Q. Do you know of your own knowledge what the net income of your business was from January—I mean February the 1st, 1948 to January the 31st, 1949?

The Court: I had not noticed the passage of time. It is customary to have a recess about the middle of the morning. Members of the jury, we will take a short recess at this time. Of course, remember the instructions of the Court. Don't speculate about the case. The court's in recess.

The Court: Court's in session. Tell the jury to come in. You may proceed.

Q. Mr. Moore, we were going into some details concerning your income at the time of the recess. I would like to back-track just a little bit. Now, I believe you testified you resumed operation of your business at Santa Rosa February the 1st, 1946; is that correct?—A. Yes, sir.

Q. Will you tell the jury what your gross income, the gross of the business was, and the net income of the
138 business was, for the resulting twelve months?—A. The gross income was \$37,421.62 and the net income was \$5,059.03.

Q. Now, in the twelve-month period after that. That is, from February the 1st, 1947 to January the 31st, 1948, what was the gross income and the net income of your business?—A. The gross income was \$47,742.63 and the net was \$1,457.57.

Q. From the period from February the 1st, 1948 to January the 31st, 1949, what was the gross income and the net income of your business?—A. The gross income was \$58,240.75 and the net was \$107.59.

Q. Do you have similar figures for the next current year,

I mean the next fiscal year, from February the 1st, 1949, to January the 31st, 1950?—A. I have the figure from February the 1st, 1949, to February the 28th, when I closed my business in 1949.

Q. That would cover a period of thirteen months; is that correct?—A. Yes, sir.

Q. What are the figures for gross income and net income for that period?—A. The gross income for that thirteen months period was \$74,270.52 and the operating—
139 in operating that thirteen months I lost \$1,936.73.

Q. And you have testified, I believe, your gross income had steadily increased during all the time from '46 until '50 but your net income had been steadily going down; is that correct?—A. Yes, sir.

Q. Do you have any explanation for that?—A. Yes, sir, it is very plain. In 1946 I already had my shop and had it set up. I just went in and went to work and showed a good profit. And in 1947 I had decided that it was necessary to buy new equipment and remodel the shop and through that entire year I was buying equipment and setting up new equipment and rewiring and buying trucks and advertising more. So that even though my business volume was increasing on account of these trucks—When you start a new route, there's always an overhead and expense to it until you get it going and that cut into my net profits. Starting new routes and new territories cut down on my net profit. And also during that time this bread price was in effect part of the time. And it affected me right in the town of Santa Rosa right on the loaves of bread I would make the best profit out of. And it was taking all of my profit out of the town of Santa Rosa.

The sales I was missing. And that left me, then, with
140 my routes, which was nothing but an expense and overhead, in an attempt to try and build them.

Q. Did you make any effort to try and compensate for loss of business in Santa Rosa through expansion elsewhere? —A. That is the reason I put on the routes, because I had no idea how long the price cuts would last. I knew they were able to continue on and if they did, it would eventually take nearly all of my business in Santa Rosa and if I didn't put on some routes and was able to bring these routes up to bring in

more business, I was out. That was my idea of putting on these routes, to hold my volume in the shop at Santa Rosa, and these routes were never successful.

Mr. Napier: We object to the testimony and move the Court it be stricken from the record for the reason there is no reason to support any recovery by reason of losses for any new venture.

The Court: I will instruct the jury on that. The objection is overruled at this time.

Q. Mr. Moore, I ask you whether or not there was any indebtedness on your business.—A. Yes, sir.

Q. To whom were you indebted when this price cutting started?—A. The Reconstruction Finance
141 Corporation.

Q. The Reconstruction Finance Corporation?—A. Yes, sir; in El Paso.

Q. You had secured a loan from them, had you?—A. Yes, sir.

Q. In what amount?—A. Ten thousand dollars.

Q. What type of loan was that?—A. It was a five-year mortgage payable monthly.

Q. What were your monthly payments?—A. A hundred and ninety-two dollars, and the interest made a difference in cents.

Q. What did you do with that ten thousand dollars?—A. It was used to purchase this new equipment.

Q. Was any of it used to retire previous indebtedness?—A. Well, it was indebtedness on equipment.

Q. Was any of the equipment you bought from Eddie Jay, was it paid for by this loan?—A. No, sir.

Q. Was any of the equipment bought at Littlefield, Texas, was it paid for by this loan?—A. Yes, sir.

Q. What amount?—A. Thirty-eight hundred dollars.

Q. When you went out of business, did you salvage anything from your equipment?—A. I had one Chevrolet
142 panel left over and some odds and ends and small equipment that no one would buy or even take.

Q. What was the value of that truck?

Mr. Napier: Your Honor, we object to that for the reason it is too remote—.

The Court: Well, I am going to permit the testimony, though I may rule on that question later.

A. It was valued at \$550.00.

Q. What happened to the rest of the equipment on which the RFC had made a loan?

Mr. Napier: We would like to renew the objection.

The Court: The same objection may go to all of this. This all occurred after he went out of business in 1950?

Mr. Blythe: Yes, Your Honor.

The Court: All right. Proceed.

A. The RFC representative came up and sold all the equipment he could sell and then we were able to have Mr. Gillespie in Tucumcari assume the balance of the note for the balance of the equipment.

Q. Are you still liable on that, or not?—A. Yes, sir.

Q. Do you have any other unpaid debts growing out of your business?—A. Yes, sir.

143 Q. What is their total amount?

Mr. Napier: We object to that for the same reasons, Your Honor.

The Court: The same ruling.

A. \$4,013.62.

Q. Have any of your creditors included in that sum made any effort to collect from you?

Mr. Napier: Your Honor, that is certainly immaterial.

The Court: That is going pretty far. Sustain that objection.

Q. Did your business have any going concern value when you sold it and sold the equipment in 1950?—A. None whatever.

Q. Were you able to sell the business as a going concern?—A. No.

Q. Mr. Moore, in your eighteen years' experience in the baking business, have you formed—I mean have you acquired—any knowledge of the buying habits of the public in respect to bread?—A. Yes, sir. That has been one of my studies.

Q. Are people fairly consistent in buying bread? That is, after they get used to one bread, are they consistent
144 or not?—A. Yes, sir.

Q. Based on your experience in the baking business, do you have any opinion as to whether or not your loss of profits due to this price cutting ceased as of the date of the price cutting being concluded or whether they continued on thereafter? Do you have any such knowledge?—A. My losses continued on—.

Mr. Napier: Your Honor—.

Mr. Blythe: I asked first whether you have any knowledge on which to base an opinion.—A. Yes.

Q. What is your opinion?

Mr. Napier: We object to that, Your Honor, because—.

The Court: I think that is a matter for the jury to determine, Mr. Blythe. Sustain the objection.

Q. Mr. Moore, based on your experience in the baking business, do you have any opinion as to the amount of profit that you could have expected to have made but for this price cutting in the years 1948 and '49?

Mr. Napier: Objected to for the reason, Your Honor, it would be a conclusion of the witness and invade the province of the jury.

145 The Court: Of course he can answer whether he has any such opinion, answer yes or no. But the next objection would be sustained, Mr. Blythe, so there is no use in proceeding.

Mr. Skarda: May it please the Court, the plaintiff would like to know upon what basis the Court is sustaining the objection.

The Court: I have sustained the objection, Mr. Skarda. It isn't usual for the Court to be cross-examined on his ruling. Proceed.

Q. Mr. Moore, how much profit would you have made if it had not been for the price cutting in 1948, 1949 and 1950?

Mr. Napier: Just a moment. The question, of course, is too general. It should be limited.

The Court: It is what?

Mr. Napier: It is too general and encompasses—too remote from any claim made in this cause of action. We further object to the question for the reason it isn't shown during what period of time this defendant was engaged in commerce at any point. The testimony up to now, this character of testimony being admitted at a time when the plaintiff hasn't shown—the plaintiff isn't shown to even have the—.

The Court: What was the period of time you were asking about, Mr. Blythe?

146 Mr. Blythe: 1948, 1949 and 1950. It is our contention, and we have some authorities which we would like to present to the Court, we are not limited to actual loss of profits during the period of the price cutting, but we may continue—.

The Court: Well, I understand that. I think the evidence you have introduced concerning the business, or matters of fact to which the witness has testified, is probably admissible. I doubt very much as to whether this witness can express an opinion as to what the future profits might have been. That is for the jury to determine. But that is not the grounds for the objection, so the objection is overruled.

Mr. Napier: We renew our objection and include the grounds it is calling for the opinion of the witness.

The Court: It is guesswork and speculative.

Mr. Napier: We further object to it for the reason the plaintiff here seeks to prove damage but at a time after suit was filed and he doesn't show it was the result of any act committed prior to the time this suit was filed.

The Court: When was the suit filed?

Mr. Napier: March the 4th.

The Court: I think I will sustain the objection. All this is opinion evidence. I may submit the question to the jury and let them determine on the basis of facts testified to by the witnesses.

147 Q. Mr. Moore, maybe you have already testified you had eighteen years experience in the baking business.—A. Yes, sir.

Q. In the course of that experience, have you had occasion to learn as to what the anticipated profits in a baking business may be expected to be with reference to the gross income?—A. Yes, sir.

The Court: Mr. Blythe, you said you had some authorities. Do you have any authority holding a witness may express his opinion as to anticipated profits?

Mr. Blythe: If the Court please, I don't have it right at my fingertips but I have read cases that hold a man is the best witness for that sort—that is to testify to anticipated profits—of his own business. If he doesn't know, who would know? What his loss profits would likely be. But I am attempting now to establish Mr. Moore as an expert witness.

The Court: I doubt whether it is the subject of expert testimony. That is the question, whether as an owner as an expert witness. It enters so far into the realm of speculation and guesswork. That is the point I want authorities on.

Mr. Blythe: If the Court please, damages of this sort are by nature speculative to a certain extent but the courts
148 have universally ruled that they, nevertheless, may be recovered.

The Court: I haven't held they cannot be recovered.

Mr. Skarda: May it please the Court, I believe the question was decided in New Mexico in the Barfield vs. Damon case, and they held that type of evidence was inadmissible.

The Court: Get the authority later. I will sustain the objection at this time and if you can produce the authority, I will let it in after the noon hour. Proceed with the other evidence.

Mr. Blythe: I have no further questions, if the Court please, of this witness at this time, but I would like to reserve the right to recall him to question him further along this line.

The Court: You may do so. If I decide that evidence is

admissible, you may recall the witness to testify on this point. You may cross-examine.

Mr. Napier: May I make a statement to the Court, please, in the presence of counsel at the bench?

The Court: You may approach the desk.

(Off the record between Court and counsel.)

Cross-Examination by Mr. Napier.

149 Q. Now, Mr. Moore, we will get some preliminary things out of the way. If you will pardon the personal reference, you gave me a letter to the RFC authorizing them to give me any reports, letters or anything you had submitted to them. That's correct?—A. Yes, sir.

Q. And I hand you a copy, a photostatic copy of that letter. That is the letter, isn't it?—A. Yes sir.

Mr. Skarda: May we examine those, counsel?

Mr. Napier: If you want them in evidence, I have no objection to putting them in.

Q. I hand you a letter, Mr. Moore, that you wrote to the Reconstruction Finance Corporation April 24th, 1947. Will you identify that, please?

Mr. Skarda: May it please the Court, would counsel please speak a little louder? We are some distance from the witness.

Mr. Napier: Yes, sir.

The Court: Yes, it is very difficult in this room to hear. Raise your voices, all of you. It is difficult for me to hear. What is that, Mr. Napier?

Mr. Napier: A letter he wrote to the RFC.

150 The Court: You have asked him if that is the letter?

Mr. Napier: Yes, sir.

The Court: Can you answer that, Mr. Moore?

A. Yes, sir, it is the letter.

The Court: Proceed with your next question.

Mr. Napier: I was going to establish—.

The Court: He has identified the letter. Now, what is the next question?

Mr. Napier: I was going to establish some others. That is the letter, sir?—A. Yes, sir.

Mr. Napier: We offer it in evidence.

The Court: Any objection, gentlemen? Have you seen the letter?

Mr. Skarda: No, sir.

Mr. Napier: It is a letter you wrote to the RFC?—A. Yes, sir.

(Marked Defendants' Exhibit A.)

Q. I hand you a loan application which you made to the RFC. The date is a little confused here. I assume that is May the 16th, 1947. I will ask you if that is a correct reflection, copy of that application, and a correct statement, correct copy of everything you placed on that application?

151 Mr. Blythe: No objection to the admission of this.

The Court: What is the number?

Mr. Blythe: Defendants' Exhibit A, Your Honor.

The Court: Defendants' Exhibit A is admitted.—A. Yes, sir.

Q. That contains a balance sheet and profit and loss statement and the instrument correctly reflects the condition of the business at that time of the gross business and operating cost and net profits for the period indicated to be covered there?—A. Yes, sir.

Mr. Blythe: If the Court please, are you offering that in evidence?

The Court: Has it been marked?

Mr. Napier: No, he got it before—.

The Court: Have it identified first. Always have these marked.

(Marked Defendants' Exhibit B.)

Mr. Blythe: No objection.

The Court: Admitted.

Q. I hand you here an operating profit and loss statement for the period February the 1st, 1947 to January the 31st, 1948, together with an attached exhibit reflecting a more detailed statement of your costs. I ask you whether or not you submitted that to the RFC and whether or not that
152 truly reflects gross receipts and costs of operation and net profits for the period shown?

Mr. Blythe: If the Court please, we would like to know the purpose of this exhibit. I doubt its materiality.

The Court: Well, I assume, Mr. Blythe, inasmuch as you examined on direct examination concerning this identical period it is merely part of the cross-examination.

Mr. Blythe: If it can be shown they differ in any respect to the figures already submitted, I can see their materiality.

The Court: I don't know whether they differ or not. Do you contend, Mr. Napier, there is a difference that sheds any light on the direct examination?

Mr. Napier: Yes, sir.

The Court: If it is only corroborative of his direct examination testimony, it will only encumber the record.

Mr. Napier: No, sir, it isn't. It won't encumber the record from that standpoint.

The Court: What was your answer about the last exhibit? What is its number?

Mr. Napier: It hasn't been marked.

The Court: Always have it marked first.

(Marked Defendants' Exhibit C.)

153 The Court: Have you answered the question, Mr. Witness, about this exhibit you hold in your hand?

A. What is the question?

The Court: Read the question, Mr. Reporter.

(Reporter reads the question.)

A. It was submitted to the RFC.

Q. Does it correctly reflect the condition of your business?—A. It was as far as it was supposed to at that time.

Q. To the best of your knowledge it was?—A. To the best of my knowledge it was.

Q. All right, sir.

The Court: Did you offer that exhibit in evidence?

Mr. Napier: Yes, sir; we offer it in evidence. I hand you herewith a balance sheet dated January 31st, 1948, signed L. L. Moore, a photostatic copy, and ask you whether or not that reflects the true condition of your company at the time as of January 31st, 1948.

Mr. Blythe: The plaintiff has no objection as to Defendants' Exhibit C.

The Court: Admitted.

Mr. Skarda: May it please the Court, I don't believe the plaintiff has any objection to any of these exhibits. If the reporter would mark them and let us examine them all at once, it would save a good deal of time.

154 The Court: I suggest you do that, Mr. Napier. Let the reporter number them and submit them to opposing counsel and let them agree to them.

Mr. Napier: All right, sir. Let me line them up so that they may look at them with some intelligence and they can have them.

(Marked Defendants' Exhibits E, F and G.)

(Off the record.)

The Court: Do you have any objection to any of these exhibits?

Mr. Skarda: If the Court please, the plaintiff has no objection to the exhibits as such, except with reference to the income tax returns. I don't believe they show any discrepancy that would be different from the testimony of the plaintiff in this case. That is a source of a large portion of our information. I believe it would be merely encumbering the record.

The Court: Well, is it agreed that these exhibits numbered whatever they are—down to and including Exhibit H, may be received in evidence for whatever they may show?

Mr. Skarda: Agreed.

The Court: And they are admitted, all of them.

Q. I hand you herewith a financial statement and an operating statement signed L. L. Moore, and I will ask you whether or not those two instruments reflect the true
155 gross business done by your company for the period reflected, a correct statement of expenses and profit, also that the balance sheet shown—the figures shown on the balance sheet—reflect the true condition of your business as of the date reflected.—A. Well, I don't remember the figures. I can't—.

Q. You submitted that to the RFC, didn't you?—A. Yes, sir.

Q. Did you submit them anything that wasn't correct?—A. Not in my knowledge.

Q. And you signed it, didn't you?—A. Yes, sir, at the time I presume it was correct.

Q. All right, sir. If it was correct then, it is correct now, is that right?—A. Well, I can't swear that this will compare with my income tax return because it is different months.

Q. I will place you at rest. It does on that *gound*.

The Court: I think the witness has answered they were correct to the best of his knowledge.

Q. Is it correct to the best of your knowledge?—A. To the best of my knowledge, they are; yes, sir.

Q. Thank you. I hand you three income tax returns, marked G, F and E. I will ask you whether or not those are correct copies of the return filed with the Collector of Internal Revenue in Albuquerque?—A. To the best of my
156 knowledge, they are.

Mr. Napier: Now, may I have a moment to confer with counsel for the plaintiff, please, sir?

The Court: You may.

(Off the record between counsel.)

Q. Now, Mr. Moore, in your letter dated April the 24th, 1947, addressed to the RFC, I will ask you whether or not you stated this: "I am a man thirty-two years old, married and have no children. I have been a baker since 1934. I worked in a number of shops until 1940, when a good friend of mine helped me get started in business for myself here in Santa Rosa. I operated a successful business until 1943 when I went into the army. I was in the army (as a baker) for three years. I was released in December 1945, and I reopened my bakery in January 1946.

"I have a nice little business now with about ninety percent of the business in town. One of the largest bakeries in this part of the country tried to come in the other day, but could not make a stop.

"Now, the thing I want to do is enlarge, and I need some money to do it in the way that it should be done. For one thing, the quicker I can get started, the better.

157 "I have bought enough equipment to completely remodel my shop. I have it all in the building now with the exception of my oven, and it is being made. The next thing I need is new bread pans and a large delivery truck.

"Also, there is a small retail bakery in Las Vegas for sale, and I want and need it very much. With that retail shop I could make bread here and truck it there and it would give me the outlet and the volume of business I need. I don't know how much it will take to handle it, but it shouldn't take much. The place is in operation and is doing very good, but the owners want to leave town. Las Vegas is a good town, and a wonderful opportunity for a good progressive bakery. I have been checking it a long time.

"At present I owe \$2,300 on some of my equipment. I value my entire bakery at \$12,000. I need \$5,000 to do what I have planned. I want to pay off this note of \$2,300 and use the rest in this shop in Las Vegas, and to complete my shop here." I will stop there for the purpose of the record. You may read it to the Court and jury if you wish. You had ninety percent of the business in town in 1947, didn't you?—A. That was my guess at that time.

Q. Yes, sir. Now, who were your competitors at that time? You had ninety percent. Who had the other ten percent?—

A. What month was that?

Q. April 1947. That was almost a year—no, not
158 quite a year, less than a year before Meads Fine Bread Company first made deliveries in Santa Rosa.—A. It must have been Purity from El Paso.

Q. Purity from El Paso. And you held that ninty percent of the business how long?—A. Well, I don't know. I guess I held it until Meads came in. That ninety percent was my guess and I made the guess to make it look good to the RFC.

Q. Well, to all practical purposes you had the business in Santa Rosa, didn't you?—A. Yes.

Q. Now, explain to the jury just what you made and what you sold and what you purchased on the outside and what you sold.—A. Well, I made bread, white bread and whole wheat bread, and sold it just as an ordinary bakery. I also made pies and cinnamon rolls and fruit rolls and cakes and cookies. Wholesaled some of them and retailed some of them. That would just about cover it.

Q. Did you purchase any cakes?—A. Yes, I purchased cakes out of California most of the time. I ordered cakes and delivered them on a percentage basis as a jobber would.

Q. You bought them at the jobber's price and wholesaled them out?—A. Yes.

159 Q. Now, for clarification for the purpose of enabling you to understand me and me to understand you, you have a bread business which is a department of your company or plant; that's right?—A. Yes, sir.

Q. And then you had a pastry business and may we, for the purpose of this trial, call pastry cake, and doughnuts and cinnamon rolls and things of that character you made?—A. All right, sir.

Q. Call those pastries. Cakes will be the things you bought from Los Angeles.—A. Cakes will be what came from Los Angeles.

Q. Yes. Is that a reasonable classification?—A. I guess it is.

Q. Now, the operation of your plant has two departments. You had a bread plant and then a cake plant. It was all in the same room and maybe a small part of the equipment you

used for the same business but substantially it was different equipment.—A. No. The cake came readymade.

Q. I beg your pardon. I am the first one to violate our rule. Pastries.—A. Now, state the question again.

160 Q. The bread portion of your business is something separate and apart from your pastry business, use different machinery to some extent, don't you?—A. To some extent, but it all went through the same oven.

Q. But you made and mixed it in separate—. A. Yes, we have bread mixers and cake mixers.

Q. So it is two separate departments in your business?—

A. I operated as one.

Q. But it is two separate departments, isn't it?—A. I don't think it could be called as two separate departments because I could make bread on my cake machine and I did a lot of times.

Q. There are two different things, cake and bread?—A. Two different items.

Q. And you could make a profit on cake and not make a profit on bread, couldn't you?—A. Under certain circumstances.

Q. Oh, it could be?—A. Yes, it could be under certain circumstances.

Q. All right. And did you keep any separate record between the pastries and the bread?—A. No.

Q. Did you keep separate records as to your cakes bought in Los Angeles?—A. No.

161 Q. You didn't lose any money on those cakes from Los Angeles at any time; that was a commission proposition, wasn't it?—A. Well, I had to stand my own stales.

Q. That cut into your commission?—A. Well, it depended on how many I picked up, how much it cut into the commission.

Q. You don't make those?—A. No, sir.

Q. It is just a commission proposition?—A. It is just a commission proposition.

Q. There is no complaint about cake sales here?—A. No.

Q. And no complaint about pastry sales?—A. No.

Q. The only complaint you have is a complaint concerning bread?—A. Yes.

Q. And now, then, what items of bread do you say Meads cut the price on?—A. White bread.

Q. White bread. Now, that is the only item we are interested in here now from the standpoint of price reduction.—A. That's correct. I don't remember if whole wheat bread was cut, but I think it was, too.

Q. All right. Just for the purpose of examination, let's include it. There isn't a great deal of that sold, anyway?—A. No; a small amount.

Q. That is a very small item in Santa Rosa. Now, then, we are only concerned with white bread and whole wheat.—

A. All right.

Q. You are not complaining about sales of other types of bread, specialty breads, here at all?—A. No.

Q. All right, sir.

The Court: I think at this time while we are talking about pastry and cakes and bread we had better go to lunch. The members of the jury may retire. I will ask counsel to remain a moment. Be back at one-thirty.

(Jury leave the courtroom.)

The Court: I will hear your New Mexico authority after the jury gets out.

(Argument.)

Mr. Skarda: Your Honor, may we make our offer?

The Court: Yes.

163 Mr. Skarda: With respect to the objection made by the defendant to the testimony of the plaintiff on direct examination that he knew the business of baking in Santa Rosa, New Mexico, and its vicinity, that he had been engaged in the baking business for a period of eighteen years, and was well acquainted with the relation of net profit to the gross sales of the baking business, and of that particular baking business in Santa Rosa, that the plaintiff, if permitted by the Court, would have testified on the baking business in this area and under the conditions above stated the reasonable profit to be expected would be ten percent, at least, of the gross sales of the business; that the plaintiff further objects to the refusal of the Court to permit the introduction of such testimony on the ground that it is fully covered by the case of Barfield vs. Damon.

The Court: Now, if he is going to limit his expert opinion that it would run to ten percent of the gross sales, I will permit him to answer that.

Mr. Skarda: We will be happy with that, Your Honor.

The Court: That would be a matter within his knowledge about which he could testify. I thought he was going to anticipate he would make fifteen or twenty thousand dollars a year without regard to sales or anything like that. But if
164 you limit your question and he limits his answer he would make an anticipated profit of ten percent for that period of time, I will permit him to answer.

Mr. Skarda: Well, that is as far as we want to go. We will do that when the jury returns.

The Court: Yes. You may do that when the jury returns. Court will be in recess until one-thirty.

The Jury: Tell the jury to come in. Let Mr. Moore take the stand. I think, gentlemen, that in order to have—to prevent redirect examination and recross-examination, I will permit plaintiff's counsel at this time to propound the question that was agreed upon during the absence of the jury. You may cross-examine and finish it all at one time, Mr. Napier.

Q. (By Mr. Blythe) Mr. Moore, will you state again how long you have been in the baking business?—A. Eighteen years.

Q. How much of that was in the wholesale baking business, that is manufacturing bread and selling it wholesale?—A. All of it.

Q. How long were you in the baking business in Santa Rosa, New Mexico?—A. From July 1940 until I closed up
165 in the last of February 1951, except the time I was in the Army.

Q. Does your experience in the baking business, both in and out of Santa Rosa, New Mexico, that is from your experience in the baking business both in and out of Santa Rosa, New Mexico, do you know what percent of the gross sales of a bakery business like yours, located in Santa Rosa, New Mexico, would customarily be profit?—A. Yes, sir.

Q. What is that percentage?

Mr. Napier: Your Honor, we object to that, as to what was customary, for the reason that the question before the Court, if this plaintiff is entitled to recover anything, is the profit he did lose. The question of whether or not the plaintiff did make a profit is of major importance in this case, and one of the principal issues. We further object to the question and to any answer that might be given by the plaintiff, for the reason it is a conclusion and invades the province of the jury. If it isn't limited to any particular time or place and if isn't limited to the time for which recovery may be had in this case. It isn't shown that the conditions during whatever time he is speaking of here remained the same or whether or not they were constant during that period of time, and it isn't limited to the products about which the complaint is made. There is no basis, the plaintiff doesn't testify upon what basis he is making this estimate, whether it is
166 being made from the records, whatever he is estimating it on, and it is speculative and a mere guess on the part of the witness.

The Court: Assuming—I presume, Mr. Blythe, you are assuming—that if conditions remained substantially the same, and you are calling for his opinion as to the town of Santa Rosa and basing it upon his experience there and upon his general knowledge of the business; is that correct?

Mr. Blythe: That is correct, Your Honor.

The Court: And are you limiting it to the bread sales?

Mr. Blythe: Yes, Your Honor.

The Court: The percentage of the gross profits on the sales of bread?—with that understanding—You understand that, Mr. Witness?

A. I didn't understand the way you talked it.

The Court: Reframe the question, Mr. Blythe.

Q. Mr. Moore, based on your experience of the baking business in general, and especially your experience in the manufacture and sale of bread at wholesale in Santa Rosa, New Mexico, and elsewhere, do you have an opinion as to what percent of gross sales of bread so manufactured in a bakery like yours located in the town of Santa Rosa, New

167 Mexico, during the period of September 3rd, 1948, to April the 26th, 1949, inclusive, would customarily be profit?—A. Yes.

Q. What is your opinion?

Mr. Napier: May we have the same objection, Your Honor?

The Court: Overruled.

A. At least ten percent.

Q. Now, with respect to your previous testimony as to the chart we exhibit here as Plaintiff's Exhibit 1, for the benefit of the jury I would like for you to give the difference between the gross sales of bread in the town of Santa Rosa, New Mexico, by your bakery, for the period September the 3rd, 1948, to April the 26th, 1949, and for the same period the preceding year. Will you give those figures, please?—A. Which ones do you want first?

Q. Either one.—A. The year from September 1947, did you say, to 1948?

Q. Yes.—A. The gross sales was \$21,499.01.

Q. That was the year before this price cutting, wasn't it?

—A. Yes, sir. And during the period of the price cutting the gross sales was \$12,733.40.

168 Q. What is the difference, then between those two figures?

Mr. Napier: We object, Your Honor.

The Court: It's a matter of calculation.

Mr. Napier: Because it isn't limited to bread.

The Court: It might help the jury to calculate it.

Mr. Napier: We object because it isn't limited to the items about which complaint is being made.

The Court: Are you talking about bread?

Mr. Blythe: If the Court please, this is limited explicitly to bread sales in Santa Rosa, New Mexico.

The Court: You do limit it to the bread sales?

A. Yes, sir.

The Court: He may answer.

Q. What is that difference, Mr. Moore?—A. \$8,765.61.

Q. Is that difference reflected on the chart which is plaintiff's Exhibit 1?—A. Yes, sir.

Mr. Blythe: Take the witness.

The Court: Now, you may resume your entire cross-examination, Mr. Napier.

Mr. Napier: Yes, sir. In view of the fact that the plaintiff has not gone forward with his question of commerce, 169 may it be understood our examination with reference to profit is subject to our exception to the testimony of the plaintiff with respect to damages during any period that this defendant wasn't engaged in commerce, and for any damages that resulted after the date of the filing of the petition which did not result—.

The Court: You may proceed with the cross-examination with that understanding.

Mr. Napier: From the acts prior to the filing of the petition.

Cross-Examination by Mr. Napier (Resumed).

Q. All right, Mr. Moore, I believe we started to ask about our competition. We were talking about that. That was, again, who was competing with you immediately prior to January the 31st, or January of 1948.—A. Chiordi Bakery out of Albuquerque and the Cottage Bakery out of Albuquerque.

Q. And it was your estimate, or you felt like, up to that time you held ninety percent of the business in town?—A. Yes, sir.

Q. Now, what happened in January of 1948?—A. That is when Meads came to town?

Q. I am asking you.—A. Yes; that is when they 170 came to town.

Q. All right. What did they do when they came into town?—A. Well, they solicited the stores—.

Mr. Blythe: If the Court please, the plaintiff will object to this question because it is immaterial to any issue in this case. What the defendant did when he came into town in January 1948. And what Chiordis did in 1948 would also be immaterial.

The Court: Overrule.

Q. What did they do when they came to town?—A. Came in and solicited stores as ordinary bakeries do and they were able to get in one store and move my racks out on the sidewalk and put in new racks.

Q. We will talk about the racks in a minute. They offered their bread in that market?—A. Yes, sir.

Q. They hadn't been there prior to that time?—A. No, sir.

Q. They weren't the company you spoke of in your letter and said they couldn't make a stop?—A. I don't think so. I don't remember that.

Q. That letter was written in 1947.—A. Yes.

Q. Not quite a year before. All right. Were their
171 selling methods fair?—A. As far as I knew, they were.

Q. Did they misbehave in any way coming in there?—
A. Not that I know of.

Q. Make any attack upon you?—A. No.

Q. Take any unfair advantage of you with your customers?—A. No.

Q. They were legitimate competition, weren't they?—A. Yes.

Q. You had no ill will toward them?—A. No.

Q. They had no reason to have any ill will toward you?—
A. No.

Q. That condition remained the same up until when?—A. Up until the prices cut.

Q. All right. Now, then, I took your deposition just shortly after you filed this suit. We took the deposition about June or July 1949. Do you recall that occasion in the courthouse at Santa Rosa?—A. Yes, sir.

Q. That was very shortly after prices were increased?—
A. Yes, sir.

172 Q. And I will ask you to tell the jury whether or not you testified to these facts: "Well, the first day Meads come to town, they put two new racks in Brown's Grocery and moved mine out on the sidewalk. That, right away, gave them about half the business." You meant in Brown's Grocery?—A. Yes, sir.

Q. Brown's Grocery is a sizable store there?—A. Yes, sir.

Q. One of the biggest. "That was in January. The first day they come to town. I knew at that time that that was all they would need to come into town, would be one store. And I knew there wasn't enough business here for them and me both." That's right, isn't it?—A. Yes, sir.

Q. "And when I drove by and saw my rack sitting on the sidewalk, I decided right then the quickest way to get out of town would be the best plan for me."—A. Yes, sir.

Q. "It was the day I started planning to move to Tucumcari."—A. Yes.

Q. "And then they gradually, I don't know how long it took them, I think about two months, to get in all the grocery stores. And they walked on like that on through until
173 about June, I guess, and I found a new building over in Tucumcari that I liked, so I went over and rented."
—A. Yes, sir.

Q. You testified to that fact. I will ask you whether or not you also testified: "Well, to start back from the beginning, the day Meads came in town, they were able to get into one of the best stops in town and convince the store that they should put in new racks, and they put in two new racks and moved my racks out on the sidewalk. That was to their own good, but I knew by that act they would never leave Santa Rosa, being able to put two racks in one store, and I knew the business in Santa Rosa wasn't sufficient to support me and an out-of-town bakery, and I started making plans to move my shop from Santa Rosa. And over a period of a few months, well, I was able to obtain a building in Tucumcari, and I leased the building and planned to move, and just before—about a month before I planned to move—I had to tell the man who I was renting from in Santa Rosa that I planned to move and wanted to be released from the lease I had on the building or for permission to sublease it. And when I told him about leaving, well, he got up in the air and told some others and none of them wanted me to leave, and that
is what started this petition, and that is what started
174 the price cutting."—A. Yes.

Q. That is correct, isn't it?—A. That is my testimony.

Q. That started the price cutting and the petition?

Mr. Blythe: If the Court please, the plaintiff will object to this line of cross examination. It is improper cross-examination. It should be part of the defendants' case in chief. The plaintiff has not gone into any such matter on direct examination.

The Court: You went into the question of price cutting, Mr. Blythe, and anything that is connected with the price cutting itself is a proper subject of cross-examination, not as part of his case in chief, but merely as cross-examination of the witness.

Mr. Blythe: If the Court please, I think the defendant is going to try to establish a justification—.

The Court: I can't anticipate what defendants' counsel has in mind, but as long as he confines his questions to matters relating to the price cut or possibly laying a foundation for impeachment, it is proper cross-examination. Overrule the objection.

Q. The petition started the price cutting, is that right?
—A. Yes, sir.

175 Q. Now, about this petition, Mr. Moore: "When did you first learn of this proposed petition?" "Well, on the day that I told Mr. Lucero—" He was your landlord, is that right?—A. Yes, sir.

Q. Was that John Lucero?—A. Bonnie Lucero.

Q. Bonnie. "—that I planned to move, well, he got some fellows together, and they called me up and asked me what it would take to keep me in Santa Rosa, and not move my plant, and I told them I didn't know. I didn't know of anything they could do. I didn't think there was anything possible to do to keep me there, and they talked a while and asked me if I would stay if all the merchants in town agreed to patronize me. And after thinking it over two or three days and all the odds and ends of going and everything, I decided if the merchants wanted me to stay that bad that I would stay if they would support me one hundred percent. So these fellows got out this petition and all except one store had signed the petition a hundred percent." What did that petition say, Mr. Moore?—A. It was just—I don't remember word for word. I never read it but one time. But it was just

176 an agreement they would support me one hundred percent.

Q. What do you mean by support?—A. They would put me first. They would give me one hundred percent cooperation.

Q. They would buy only your bread, wasn't that it?—A. No.

Q. You say that is not true?—A. That is not true.

Q. You say that petition did not and the effect of that petition wasn't they would buy only your bread?—A. I never understood it that way.

Q. Wasn't that the effect of it?—A. I don't know what the effect might be.

Q. Didn't it result in it?—A. No.

Q. You say it didn't?—A. No, because one store never signed it.

Q. All right; except that one store.—A. And possibly more.

Q. All right; let's get our testimony here then. We have lots of it. We are talking about the boycott on page 36 of the record, discussing the petition now, and the boycott. "That was the effect of it, wasn't it?" Answer: "It had that effect —" was your answer. Is that true or not?—A. That was what I answered at that time.

177 Q. That was true, wasn't it?—A. It wasn't in the whole town.

Q. I didn't ask you that. It had that effect?—A. Yes, it did; in some stops it did.

Q. It had that effect in Santa Rosa?—A. No.

Q. It didn't?—A. Because Lilly's store never signed the petition.

Q. Now, except that one store—We will talk about Lilly's in a minute.—it had that effect, didn't it?—A. Yes.

Q. And you knew it had that effect, didn't you?—A. I never understood the petition—.

Q. All right. I will read—.

The Court: Mr. Napier, let the witness answer the question. Let him finish the answer before you interrupt him. Had you finished your answer?

Mr. Napier: I'm sorry. Had you finished?—A. Yes. Go ahead.

Q. "And you knew what the effect would be" and you answered "Yes, sir." Is that true or not?—A. Yes, sir.

Q. "And you were willing to accept the benefits?" Is that right?—A. Yes, sir.

178 The Court: Well, now, you are answering as to what you testified before?—A. Yes, sir.

The Court: You understand that?—A. Yes, sir.

The Court: All right.

Q. Is your testimony the same now?

The Court: Read the question and answer both so that he will have the full import of your interrogation.

Mr. Napier: Yes, sir.

Q. Is your answer the same now?—A. Yes, sir.

Q. All right. Now, then—

The Court: So that opposing counsel can keep up with it, give them the page if you change pages.

Mr. Napier: Yes, sir.

The Court: I thought you were changing.

Mr. Napier: Page 15 of the deposition taken very recently on February the 11th of this year; page 15: "Let's be fair about this thing now. They had to get Meads out of town, didn't they?" Talking about the merchants. "They had to quit buying Meads bread." "No." You answer: "They had to buy my bread." Question: "They had to quit buying Meads bread, too, didn't they?" "Yes." Is that what you testified before?

179 A. Yes.

Q. And was that true?—A. Yes.

Q. It was true then and it's true now?—A. Yes.

Q. All right, sir.

Q. "Yes. They had to buy only your bread and not buy any of Meads bread, is that correct? Isn't it? That is correct, isn't it?" Answer: "Well, wasn't supposed to be any out-of-town bread." Is that true or not, Mr. Moore?—A. That's true.

Q. All right, sir. "Thats right, just buy your bread." Answer: "Yeah." That is still true?—A. Yes.

Q. "So that you would have a monopoly of the business, that is right, isn't—isn't that right?" Answer: "I suppose." That's true, isn't it?—A. Yes.

Q. And you would have the monopoly, wouldn't you?—A. With the exception of this one store.

Q. One store, Lilly's?—A. Yes.

Q. That's right. I say "Suppose, it is right, isn't it?" Answer: "Yeah, I would have the business." You testified to that before, didn't you?—A. Yes.

Q. "You would have a monopoly on it, wouldn't
180 you, Mr. Moore, isn't that right?" Answer: "I don't know if you call it monopoly or not." Question: "You wouldn't have any competition, would you?" Answer: "No." That is what you testified to?—A. Yes, sir.

Q. And it was true then?—A. Yes, sir.

Q. And it's true now?—A. Yes, sir.

Q. All right, sir. Now, do you want to tell us now yourself that the effect of that petition wasn't to run Meads out of town?—A. It couldn't run Meads out of town—.

Q. Except for Lilly's,—.

Mr. Blythe: May it please the Court, let the witness answer the question.

The Court: Yes. He hadn't finished his answer, Mr. Napier, I don't think. Finish your answer.

Mr. Napier: I beg your pardon.

A. I said it couldn't run them out of town because they still had this one stop, and I have learned later on another one, and they were coming through going to Las Vegas and they would automatically just drop off bread there. And
people in Santa Rosa would still have a chance to buy
181 Meads bread through this possibly one or two stops.

Q. Except for that?—A. Well, I have learned of another stop, too.

Q. What was that?—A. Jack's Court.

Q. Jack's Court?—A. Yes, sir; Jack's Court.

Q. We will look into that presently. Now, then, the purpose and the effect of that petition was to run Meads out of town except for Lilly's and give you a monopoly of business except for Lilly's.—A. The purpose of the petition was to keep me in town.

Q. I didn't ask you that, sir.

The Court: Proceed with the next question.

Q. The effect of the petition was to run Meads out of town and give you a monopoly, wasn't it?—A. The effect of it was to help me.

Q. All right, sir. Did you tell us the truth when I read these questions to you in your deposition?—A. Yes.

Q. Was that true?—A. Yes.

Q. All right. All right, sir. Now, you say Meads moved some racks into town into Brown's Grocery?—A. Yes.

Q. Now, then, they moved your old racks out?—
182 A. Yes.

Q. Now, then, these were nice new, shiny racks?—
A. Yes, sir.

Q. They were devised by sales engineers to better display bakery products, weren't they?—A. Yes, sir.

Q. They were of later design than yours?—A. Yes, sir. My racks—.

Q. Sir?—A. I said my racks was some I had left over when I went in the army and still used them after I came back.

Q. Now, then, your bread and bakery products sat on those nice new racks, didn't they?—A. On the back of them; yes.

Q. Are you sure they weren't on the top rack?—A. Yes, sir.

Q. You are absolutely positive?—A. Yes, sir; I'm sure. I mean by back, the rack set east and west and I was on the west end of the store facing east.

Q. But you were on the forward portion of the rack, weren't you, sir?—A. Well, it wasn't counted the forward position in that particular store.

Q. And you were on the top rack, weren't you?—
183 A. I was on the top rack, but it was on the back of

the rack.

Q. Yes, sir.—A. The way bakers look at a rack and the way customers look at a rack.

Q. You had a good position on that rack.—A. Not the No. 1 position; I had the No. 2 position.

Q. But at any rate, no one objected to putting your bread on the Meads racks?—A. No.

Q. And the racks were designed to sell bread and helped your sales along with Meads if those racks had any effect.—

A. Not with me on the back of them.

Q. There wasn't anything wrong with putting new racks in!—A. No.

Q. It was perfectly legitimate business?—A. Yes.

Q. Helped the looks of the man's store, didn't it?—A. Yes.

Q. All right. You returned from Tucumcari after you had gotten a lease over at Santa Rosa, you had made up your mind back there the first day Meads came to town the
184 thing for you to do was get out of town; is that right?

—A. Yes.

Q. You just couldn't make it there with Meads in the market with you?—A. That's right.

Q. It was impossible for you to exist?—A. That's right.

Q. So there was only two alternatives, to either close down or move out; is that right?—A. That's right.

Q. You had reached that conclusion back in January 1948; right?—A. That's right.

Q. And this price cutting didn't take place or the boycott didn't take place until September of 1948?—A. That's right.

Q. Some eight months later.—A. That's right.

Q. And prior to this price cutting you spoke of, Meads weren't taking any unfair advantage of anyone, were they?—A. No.

Q. They were legitimate business men in.—A. Yes, sir.

Q. —competition with you?—A. Yes, sir.

Q. All right, sir. So you had a big gamble ahead of
185 you. You had to make up your mind whether to stay there and take advantage of this petition or move.—A. Take advantage of the cooperation that the merchants offered.

Q. Of the petition or monopoly they wanted to give you. If you wanted to take advantage of this, of the benefits of the boycott, you had to elect to stay there and take advantage of any benefits of the boycott or move to Tucumcari. Is that the option you had to do then?—A. I don't think you should call it a boycott.

Q. What would you call it when all the merchants in town

except one refused to buy someone's product, Mr. Moore?—

A. It would have to be all of them.

Q. Well, all these others, what were they doing, what would you call it?—A. They were just cooperating and helping me.

Q. That is from your standpoint. But from the defendants' standpoint, what were they doing to them?—A. Well, I don't know.

Q. They were boycotting, weren't they?—A. The intentions were to help me.

Q. They were refusing to buy Meads Bread, weren't they?

—A. Some of them were; yes, sir.

186 Q. Some of them?—All but one.—A. I think two.

Mr. Standley: Your Honor, the witness has already stated there were two and Mr. Napier keeps referring to it as all but one. We object to that.

Mr. Napier: Your Honor, he has testified both ways.

The Court: Don't comment on the testimony. The jury will recall the testimony of the witness by what the witness says rather than by what counsel say. Proceed.

A. May I make a statement?

The Court: Well, that's always dangerous for a witness to volunteer statements. I don't know whether your counsel wants you to. You want to make a statement of your own knowledge?

A. In regard to this—He said I testified two ways about this other store—

The Court: Go ahead and make your statement, whatever you want to say.—A. I said I later learned since I testified that another store didn't sign the petition.

Q. Let me have the name of the store again.—A. Jack's Court.

Q. The route book, Meads' route book, will show whether or not they were making that.—A. Yes.

Q. All right. In your deposition taken just a month
187 or two after the trouble had ceased back in 1949, you testified as follows.

The Court: The page number, what page are you on?

Mr. Napier: I beg your pardon. I'm sorry. Page 95 of the first deposition.

The Court: Proceed.

Q. "Well, when this talk got started, and the business men here wanted me to stay, and promised, or more or less promised, to give me all the business, well, I thought it would be a better move for me to stay here with the business that I had and could get extra, too, than it would be to go to the expense of moving and moving into a new territory and the expense of building up the business there." You testified to that?—A. Yes, sir.

Q. It was true then and it's true now. So, back to our question a moment ago, now. "You had the election of either moving to Tucumcari or remaining there and taking advantage of whatever benefits might there accrue to you?"—A. I decided to stay with the help of these merchants and their cooperation. I decided to be—.

Q. Well, you had an alternative, didn't you?—A. Yes.

Q. You could have moved to Tucumcari?—A. Yes.

188 Q. And you could stay there and take advantage of this agreement that the merchants had gotten up among themselves?—A. Yes, sir.

Q. You also could have closed your business, couldn't you?—A. Yes.

Q. You had three alternatives. All right. But, now, you didn't have a lot of faith in the outcome of that petition, did you?—A. Yes; after I decided to stay, I did.

Q. You had a lot of faith in it?—A. Yes, sir.

Q. You believed in it?—A. Yes, sir.

Q. Page 21 of the last deposition, the one in February, '52: "You wanted them to go on with the boycott?" "Well, I wanted the business because I knew I had to have it to exist." "You kept hoping that the boycott would succeed?" Answer: "It had to succeed before I could exist." "You kept hoping that the boycott would succeed?" "Well, it had to." Is that your testimony?—A. Yes.

189 Q. Page 19: "If you had asked those merchants to stop the boycott, they would have stopped it, wouldn't they?" "I don't know, I told them before they started. I didn't think it would work." Did you testify to that?—A. Yes. That was before I decided to stay.

Q. All right. At page 21 of the same deposition: "I say, you kept hoping that it would succeed?" Answer: "I kept—I never did believe much—I don't know what I was hoping for because I never had much confidence in it from the beginning." Is that what you testified to, sir?—A. When was that said?

Q. July 1952, this year, sir.

Mr. Skarda: Your Honor, it shows on my deposition February the 7th, 1952, if it makes any difference.

Mr. Napier: Well, whatever it is, this year. Is that true or not, sir? It was your testimony I was reading to you.—A. I said it then; yes, sir.

Q. Then you didn't have any hope of the thing helping you? You had some doubts in your mind?—A. Well, there is always doubts about such.

Q. What were those doubts?—A. Well, they could be a number of things.

Q. For example?—A. They could be just what happened.

Q. Now, you knew that could happen, didn't you?—
190 A. Or they could be hard feelings somewhere.

Q. That's right.—A. Or some misunderstanding, or such.

Q. That's right, but you elected to stay there and accept the benefits that these merchants wanted to confer on you by the partial boycott?—A. Yes.

Q. And you just assumed that risk, did you not?—A. Yes.

Q. That was just a risk you were going to take?—A. I decided that would be the best way.

Q. Then if somebody cut the price on you, you just assumed you would have to stand that and you elected to do so if it happened; is that right?—A. Yes, sir.

Q. What happened isn't an unusual thing at all, is it?—A. Yes.

Q. It has happened before, hasn't it?—A. I never heard of a case like it.

Q. Well, not exactly like it, but such things have happened?—A. There has been price cuts and bread wars.

Q. Lots of them.—A. But I never heard of a case like this.

191 Q. Maybe not exactly like this, but the principle still operates among all merchants?—A. No.

Q. Price cutting sometimes starts when they get in trouble in a market.—A. Oh, yes; price cutting does.

Q. Now, I would like to bring—I am going to read now the testimony in the first deposition on page 106. I will ask you whether or not this was your testimony then and your testimony now: "Well, I think there was some mixup either with the witness, or with the attorney, I don't know which, but I think both was honest. But the way those meetings came about, I saw Mr. Lucero in there at Medley's one morning, I asked him about a release from the lease of this building, or permission to sublet, I told him what I intended to do, and he then after I quit talking to him went off to the register and told Medley and Coury what I was going to do, that I was fixing to leave town. They right away got them talking about what to do to keep me here. That was one of the meetings that some of them was referring to." They were three of your friends, were they not?—A. Yes.

Q. "The other meeting that the rest of them referred to, they didn't know about this one, they referred to a
192 meeting that was called after the petition was carried around and after it was signed. I think they were all honest, but there was a mixup in those meetings. There wasn't either one of them called by the Chamber." You meant the Chamber of Commerce, did you not?—A. Yes, sir.

Q. They had nothing in this case to do with this?—A. No.

Q. "This first one was just this group that was in there and happened to call it. This other one was a meeting of the grocery men when they met in the little back room." "That was after the petition was circulated." "That was after the petition was circulated and completed." "What was the purpose of that meeting?" "It was to decide on what day this petition would be effective, get them all together so that it would all be effective on the same day."—A. Yes.

Q. That was what the meeting was for, wasn't it?—A. What do you mean?

Q. To decide when this petition would be effective, the boycott would be effective.—A. It was to decide which day they would start supporting me.

193 Q. What?—A. To decide which day it would be effective and start supporting the hometown bakery.

Q. That is from your standpoint, but from Meads standpoint, it was their death toll in the Santa Rosa market. It was the date of their execution, wasn't it, Mr. Moore?—A. No, I wouldn't say that.

Q. Now, then, I will ask you to refer to the record, page 4 and 5; that will be my next reference of the record. Your numbers may differ. There may be ten pages difference between yours and mine.

(Off the record.)

Q. Now, then, you told them you would stay in Santa Rosa if they would deliver you one hundred percent of the business?—A. One hundred percent cooperation.

Q. That's right, and that meant give you the business.—A. Not all.

Q. All except what?—A. Except what didn't stay in line, what these other stores sold.

Q. Well, at that time you expected everybody to join in, didn't you?—A. No.

Q. You didn't? Didn't you testify a few minutes
194 ago, a minute ago, I read it to you and you said they weren't supposed to buy any out-of-town bread?—A. You are speaking of all of them, the question you put now.

Q. Isn't that what the petition agreed to do?—A. Yes, but you are referring to the whole town and I didn't understand it that way.

Q. Well, anyway, this petition was circulated by your friends; is that right?—A. Yes.

Q. And all the merchants in town signed it but one; is that right?—A. Well, as I have said a while ago, I have learned later another one did not.

Q. Well, maybe two; let's eliminate that, get it in here. Where was that place?—A. Jack's Court.

Q. Where was it located?—A. Out on the southwest part of town over the hill by the swimming pool.

Q. A filling station?—A. No; a group of houses.

Q. Tourist court?—A. Tourist court like, an old tourist court.

Q. It has a small grocery stop?—A. It has a small
195 grocery stop in front.

Q. They were out of town?—A. No; they were in town.

Q. Well, we will change that to two. We will let it go at that. If it doesn't so happen and there is only one, we will bring it up. All right. Were they asked to sign the petition?

—A. I suppose.

Q. Who carried the petition around?—A. I'm not sure at all, but I think John Coury had a part in it. And I think Mr. Hutchison had a part in it.

Q. Bonnie carried it, didn't he?—A. Yes; he probably did.

Q. Coury, Lucero, and Medley carried it too, didn't he, carried it some?—A. He could have.

Q. Now, who signed the petition? Name them. Let's start learning these names. Name everybody that signed that petition.—A. Well, I don't know if I should commit them or not.

Q. Why?—A. I don't have the petition; all I have is memory.

Q. That's all right.--A. Brown's Grocery, OK Store.

Q. All right.—A. And then People's Store.

196 Q. All right.—A. And Ernie's Grocery, and the Club Cafe.

Q. All right.—A. Medley's Cafe.

Q. All right.—Jack's—I'm not sure about Jack's.

Q. You have so testified before?—A. I have? Jack's Cafe. And the Court Cafe. That's all I can call to mind right now.

Q. Community?—A. Community Grocery.

Q. Moise's?—A. I was under the impression Moise's did; I'm not sure.

Q. Square Deal?—A. I was thinking they did, too, but I wasn't—

Q. Balboa?—A. Yes.

Q. BW Cafe?—A. Yes.

Q. Any others you can think of?—A. Was that testimony under the same question you asked me?

Q. I just asked you to list the ones that signed the
197 petition.—A. Well, I can't remember them all, is what I mean. And I don't have—

Q. Well, you have substantially all of them there, don't you?

The Court: When I overruled the objection of counsel as to the extent of cross-examination, I did so under the belief those first few questions would relate directly to the price cutting and, therefore, was a proper subject for cross-examination. For quite some time, Mr. Napier, your questions have gone far afield, I think, from the direct examination. You are probably interrogating and going into details of what may be your defense in the action. For the benefit of time more than anything else, see if you can't get back to the original examination.

Mr. Napier: All right, sir. I think my next line of questioning will raise the whole thing to just exactly where we were.

The Court: Proceed.

Q. All right. This was an organization of your friends, wasn't it?—A. Yes, sir.

Q. And you needed all of that Santa Rosa business to exist?—A. Yes, sir.

198 Q. And you had nothing against Meads?—A. No.

Q. They had conducted themselves properly; is that right?—A. Yes.

Q. They sold their bread at this reduced price for the purpose of combating this attack or thing that was done to them, did they not?—A. Well, as you said a while ago, that is the way they looked at it, but I looked at it differently.

Q. How did you look at it?—A. To me it was just a way of excluding me out of the market.

Q. Well, they were actually, Mr. Moore, —they cut their price in an attempt to regain their market, didn't they?

Mr. Skarda: We object. He can't have any possible idea what they cut their price for.

The Court: If he knows, he may answer. I don't know whether he knows or not.

A. I don't know.

Q. Now, then, what day was this boycott effective?—A. When I answer a question like that, is it assumed that I am assuming there was a boycott?

199 The Court: Mr. Witness, answer the question in your own words the way you want to.

A. Restate the question, then.

Q. What day was the boycott against Meads to become effective?—A. September the 3rd.

Q. All right. And on that day, that morning, everyone refused to buy Meads' products, bread and everything else, except Lilly's Grocery and this other small place out at the edge of town which you mentioned; is that right?—A. Well, they went out on the edge of town, too, and picked up some stops that was—.

Q. That was later, wasn't it?—A. No, that morning they went out and picked up some stops not selling bread and put cheap bread in there.

Q. All of the accounts they had in town on that day, the day before, refused to buy their bread and pies and cakes, if they sold pies, cakes and pastries, on September the 3rd, 1948, didn't they?—A. They did until they cut the price.

Q. That's right. So, except for Lilly's and possibly this other one you told us about, they were out of the immediate town of Santa Rosa, weren't they?—A. You mean outside the city limits?

200 Q. I suppose so. Inside the city limits. Let's limit ourselves here so that we will know what we are talking about.—A. There was one inside the city limits and one outside.

Q. All right. With the exception of the one we learned about there recently and then Lilly's and the ones they picked up that day, they were out, weren't they?—A. Yes, sir.

Q. They were excluded from that market, weren't they?—A. In those stores; yes, sir.

Q. That's right. They had two customers left, didn't they?—A. Yes.

Q. Now, we have our list of all people that made the price cut. Now, would you name the people that Meads were serving immediately prior to the boycott?

Mr. Skarda: May it please the Court, we wish to renew our objection to any possible effect of any more testimony whatsoever concerning what Mr. Napier calls a boycott. It isn't relevant at this time, certainly, to the case. Under the law of this case, I don't believe—.

The Court: What was the question?

Mr. Skarda: If he may, later on, in his own case in chief, —it may or may not be admissible. We think it is distinctly prejudicial to the plaintiff and highly improper at this
201 time. It isn't proper cross-examination.

The Court: What was the question?

(Reporter reads the question.)

The Court: I think it would be better and probably fairer, Mr. Napier, to ask him the question to list the names of the people that were Mead's customers prior to September the 3rd.

Mr. Napier: I adopt the Court's question.

Q. Will you answer it?

The Court: Answer that question.

A. I didn't understand it.

Q. Who was Meads serving in Santa Rosa immediately prior to September the 3rd, 1948?—A. Well, I can only give you what I remember. There was People's Store and the OK Grocery and the Square Deal Market and Brown's Grocery and Lilly's Store and Jack's Courts and Moise's Grocery and the Pueblo Courts; that's all I can remember.

Q. How about Community?—A. Yes.

Q. Now, then, you were serving all of these people also, weren't you?—A. Yes, sir.

Q. Your bread and Meads' bread and your pastries and Meads' cakes were sitting side by side?—A. Yes.

202 Q. Right. Now, then, I believe you stated a minute ago there was another one you had found out later about. The name of that place was Jack's Court.—A. I said he didn't sign the petition.

Q. Did Meads serve him before September the 3rd?—A. Yes, I think so.

Q. So they had ten customers, Meads had ten customers; is that right?—A. To the best of my knowledge.

Q. —And immediately after, they had two, after September 3rd when this petition went into effect they had two?—A. Yes, sir.

Q. Then they reduced the price some time after. Do you

know how long after? Was it the following day?—A. No, sir; it was that day.

Q. You think it was that day?—A. Yes.

Q. Are you sure about that?—A. In my own mind I am sure.

Q. Now, then, who started buying the bread when the price was cut?—A. People's Store and the OK Grocery and the Rancho Motor Lodge, and the Balboa Courts and Ernie's Grocery. Community Grocery, I think. That's all I can
203 remember of them.

Q. All right. Let's run down them again. Ernie's, People's, OK, Community, and Balboa. Five; is that right?—A. To the best of my knowledge, it is.

Q. All right. Rancho—that was—That is a filling station, isn't it?—A. It is a filling station and court combined.

Q. Yes, sir.—A. Rancho Motor Lodge is the name of it.

Q. They don't carry much of a stock of goods.—A. Just for tourists and their customers.

Q. Just carry canned lunch meats and things of that character, do they not?—A. Yes, sir.

Q. So that would make six, a total of six that they regained. Now, then, after the price was raised—First, though, all during this time, now, the time from September 3rd, 1948, until the price was raised, your goods were sitting alongside Meads in each of these stores?—A. Yes, sir.

Q. Your goods were sitting alone in Moise's, Square Deal, Brown's, Jack's Market, and possibly another one, but at least those four, during that time?—A. Yes.

Q. You had no competition in those stores, did you?
204 A. Well—.

Q. You had—.—A. Part of the time Meads was leaving specialty breads in there.

Q. That was when you couldn't deliver them; is that right?—A. No, it was just that they had some types of bread I didn't make that they left.

Q. That didn't amount to very much, did it?—A. Not much.

Q. And it only occurred at Brown's, didn't it?—A. And the Square Deal Market.

Q. Did the Square Deal start after the price was raised? To refresh your memory about that,—.—A. I don't remember.

Q. But it didn't amount to much, did it?—A. No.

Q. For all practical purposes, you had no competition in those four stores, did you?—A. No.

Q. Now, I will ask you the name of the three biggest stores in town.—A. Well, there is Moise's and Square Deal and Brown's.

Q. You had the biggest ones, didn't you?—A. Yes, sir.

Q. Jack's is located out in the residential district,
205 isn't it?—A. Yes.

Q. And it is a good market, isn't it, a nice store?—
A. Yes; a nice small place.

Q. Now, then, I will ask you, Mr. Moore, whether or not it is true Moise's, Square Deal, Brown's and Jack's Market continued to refuse to buy Meads' bread, Meads' products, except this small amount you told us about at the Square Deal and Brown's until the day you closed your plant?—A. There was some of them bought a few loaves and put them in the rack, I think.

Q. Are you sure about that?—A. It might be I did just see their specialty bread. I'm not sure. I wouldn't say for sure.

Q. For all practical purposes, these four, People's, Moise's, Square Deal and Brown's and Jack's, they were your customers and solely your customers until the day you closed, weren't they?—A. I wouldn't answer yes or no because I don't remember for sure. It seems to me they bought a little of Meads.

Q. But you are not sure about that?—A. I am not. I wouldn't answer yes or no.

206 Q. If you are wrong about that, you had that business from the day until the—from September 3rd until the day you closed your shop, you had that business sewed up?—A. Yes.

Q. Meads wasn't there?—A. If that thought I had was wrong, that's true.

Q. Except for possibly some small items in the stores.—A. Yes, sir.

Q. Now, then, Meads sold its bread from September 3rd, 1947 to April the 6th, 1948, which is seven months and twenty-three days?—A. Yes, sir.

Q. And they were selling it there in an attempt to regain this lost market?—A. I don't know.

Q. Meads never at any time held any store exclusively, did they?—A. This Rancho Motor Lodge.

Q. Well, they would have taken your bread, too, wouldn't they?—A. No, they told me as little as they sold, that all they wanted, was one bread.

Q. But all the rest, you either held it exclusively or held it together with Meads?—A. Yes.

Q. So there was four against ten, was the effective-
207 ness of the boycott when they raised the price voluntarily; is that right?—A. State the question again.

Q. Is that right? The petition or boycott was still four-tenths, or four out of ten was still effective insofar as the boycott and petition was concerned?—A. Yes.

Q. Now, this boycott and petition was done with your knowledge?—A. Yes.

Q. And your acquiescence?—A. Sure.

Q. And with your acquiescence?—A. I didn't understand you.

Q. With your acquiescence and consent?—A. Yes.

Q. All right, sir. Now, Mr. Moore, you inserted some ads in the Tucumcari Daily News, did you not, on October 11th, 1948; is that right?—A. Was it Tucumcari or Clovis?

Q. Both.—A. Yes, that's right.

Q. I hand you an item here, an ad, a tear sheet of the Clovis News-Journal, dated October the 24th, 1948.

208 Mr. Napier: We offer it in evidence.

The Court: Have it marked and submit it to opposing counsel.

(Marked Defendants' Exhibit I.)

Mr. Skarda: May we inquire, Your Honor, counsel seeks to introduce these particular items for what purpose?

Mr. Napier: To support justification, Your Honor.

Mr. Skarda: As a matter of law, I don't think it is admissible. There is no justification. It has already been decided.

The Court: Have they been identified by the witness?

Mr. Napier: Not as yet, sir.

The Court: Show them to him and ask him—.

Q. Did you insert this?—A. I did.

Q. In the Clovis News-Journal?

The Court: What is the exhibit?

Mr. Napier: Defendants' Exhibit I.

A. Yes, sir.

Q. And Defendant's Exhibit J, did you insert this ad in the Tucumcari Daily News October the 11th, 1948?—A. Yes, sir.

Q. What does it say?

209 The Court: He said, "Yes, sir," Mr. Reporter.

A. Yes, sir.

Q. What does the ad say?

Mr. Skarda: I object to what the ad said until the Court rules on it.

The Court: Offer them in evidence.

Mr. Napier: We offer them in evidence.

The Court: You object to the reception of these advertisements in evidence?

Mr. Skarda: Yes, sir.

The Court: Let me see them. I have no idea what they are about.

(Off the record between Court and counsel out of the hearing of the jury.)

The Court: They will be admitted. Show them to the jury.

Q. This is an ad, Mr. Moore, you inserted in the Tucumcari Daily News. Now, Meads were selling their bread at Tucumcari, were they not?—A. Yes.

Q. And it says "Meads Fine Bread is now selling at one-pound loaf for ten cents; one and a half pound loaf, fifteen cents at Santa Rosa."—A. Yes, sir.

Q. What was the price of bread in Tucumcari, Mr. Moore?

—A. It was eighteen or nineteen cents per pound loaf
210 and—the retail price, you mean?

Q. Yes.—A. It seemed like the same as I was selling at Santa Rosa, as I understand, unless there was a difference in the pound and a half. I think either eighteen or nineteen cents for the pound loaf and twenty-four cents for the pound and a half, I think.

Q. All right. You inserted this notice in the Clovis News-Journal: "Notice. Meads Fine Bread is now selling, a one-pound loaf at ten cents and a one and a half pound loaf at fifteen cents in Santa Rosa."—A. Yes

Q. And what was it selling for in Clovis?—A. The same price if those prices are correct.

Q. Now, will you explain to the jury your purpose in inserting those ads in the newspapers, Mr. Moore.—A. I was in hopes that by people learning the bread was so much cheaper in Santa Rosa, it would cause Meads to raise the price back up to the standard price.

Q. So that you could have all these other stores to yourself in Santa Rosa, is that right—A. No, just to get the price back up.

Q. So that you could have this business by yourself in Santa Rosa, is that right, Mr. Moore?—A. No.

211 Q. That's what you wanted.—A. I wanted the price up in these stores where they were selling so that the customers out of the stores where I was selling wouldn't be going to these other stores and buying bread.

Q. "It had to succeed before I could exist."

The Court: Let's not argue with the witness, Mr. Napier. Proceed.

Q. I will ask you whether or not you put that in there in an attempt to hurt Meads in its market in Tucumcari and Clovis, making the customers dissatisfied?—A. It was put in there hoping it would bring the price up in Santa Rosa.

Q. By hurting them in Tucumcari and Clovis.

Mr. Skarda: May it please Your Honor—.

The Court: I think he has fully answered the question. Sustain the objection.

Q. There was no boycott in Tucumcari and no boycott in Clovis, was there?—A. No, sir.

Q. There wasn't any price cut there?—A. No.

Q. Either place. Now, then, Meads did not cut the price of any item outside Santa Rosa, did they?—A. No.

Q. You did business outside the town of Santa Rosa, 212 did you not?—A. Yes.

Q. And some of the out-of-town business was started at the time the prices was cut?—A. Yes.

Q. And some of the out-of-town business was started at the time the price was cut?—A. Yes.

Q. But that price cut didn't follow you out there, did it?—A. No.

Q. The price remained standard?—A. Yes.

Q. Except right there in Santa Rosa and there alone?—A. Yes.

Q. And nothing was cut in Santa Rosa other than white bread and wheat bread, as you have testified?

Mr. Skarda: May it please the Court, we have, of course, no objection to counsel cross-examining the witness, but it is so repetitious, taking undue time, repeating everything two or three times.

The Court: There has been quite a bit of repetition, Mr. Napier.

Q. Now, Mr. Moore, at page 20 of the last deposition you testified that you could have stopped the merchants from boycotting Meads.—A. Read me the testimony, please.

213 Q. All right. "And they would have certainly stopped it if you had asked them to stop it, wouldn't they?" "Well, I suppose they would have." But you didn't try to stop them.

Mr. Skarda: May it please Your Honor, we again object to the introduction of any more evidence concerning this alleged agreement among the merchants of Santa Rosa. It isn't the proper defense, and if admissible at all, it is admissible on the defendants' counter claim in the case in chief.

The Court: I think you have proceeded far enough, Mr. Napier. Sustain the objection.

Mr. Napier: Your Honor, this question goes not only to the question of justification, but also goes to the plea this man brought his own damages upon himself, his damages are self inflicted.

The Court: You may call him as your own witness later, if you desire to go into the question of defense.

Mr. Napier: I didn't understand, sir.

The Court: I said you could call him as your own witness when you get to the defense. Call him as an adverse witness and ask him anything you want to. But in the interest of time—we only have so much time—sustain the objection.

214 Mr. Napier: I would like to have it thoroughly understood, we would like to call this witness back and examine him thoroughly and completely on that question of—.

The Court: You have ample rights given by the Rules of Federal Procedure. You need no promise from the Court.

Mr. Napier: Well, I didn't want to run afoul again. All right. Now, is the Court making the same ruling with reference to justification?

The Court: Yes, sir.

Mr. Napier: All right, sir.

Q. All right, Mr. Moore. May we have Plaintiff's Exhibit 1, the big chart? Now, Mr. Moore, if you will come down here, now? I believe you testified that this chart here is identical with this except that—there are some figures on here, in here, but figures that appear to be photostats are identical?—A. Yes, they are supposed to be.

Q. Now, Mr. Moore, explain to me your first figure down there. Is that the end or the beginning of September?—A. That is for the month of September.

Q. That is for the month of September. So, then, the line, then, that precedes the month represents the figure for that month; is that right?—A. Represents—.

Q. I don't think it makes an awful lot of difference,
215 except I am just trying to get it squared away.—A. This is July?

Q. This is July.—A. And that is August. Each month takes in two columns.

Q. September down there doesn't split, that short line doesn't split.—A. No.

Q. Anyway, that is represented as being September.—
A. Yes, sir.

Q. Should be on the next line. Now, Mr. Moore, I have made some calculations. If you will take this, please, sir. Now, I believe—and we go into this now, Your Honor, subject to the matter we announced at the opening after the noon session—you show a difference for September of how many dollars gross, I believe I have that all worked out here for you. If counsel would like to see it and check the figures, I would like for them to do it so that we can move along very quickly.

Mr. Blythe: Two can't look at it. One will have to. Now, what was the question?

Q. I wanted you to check and see if my subtraction and division in there is about right.

Mr. Standley: I'm sorry. What does that say?

216 Mr. Napier: That is the difference.

Mr. Standley: Between this and this?

Mr. Napier: No; right here is where I started, \$218.18. And that represents—.

(Off the record between counsel.)

Mr. Napier: The dollar difference is the only item we are interested in.

Mr. Standley: The only dollar sign you have is this one right here.

The Court: May I suggest to expedite matters, Mr. Napier, you read the figures and your calculation. You can lead the witness on cross-examination.

Mr. Napier: I was trying to avoid the calculations, Your Honor. We have about ten or twelve.

Mr. Skarda: May it please the Court, can we stipulate? Are your mathematics correct? If so, we will stipulate.

Mr. Napier: There are times I doubt my mathematics.

Mr. Skarda: Well, we will stipulate anyway.

Mr. Napier: If there is any difference, I will certainly correct it.

The Court: If there is any difference, you can correct it later.

Mr. Napier: All right. Now, for the month of September, what is the dollar difference, Mr. Moore? It doesn't
217 appear on there. I believe you told us this is before
the boycott and this is during the price cut?—A. Yes,
sir.

Q. What is the dollar difference there?—A. This is the figures there?

Q. In that particular one. All the rest of the figures, I am going to ask you about.—A. 113—no, that's wrong; \$163.12.

Q. Ten percent of that is what?—A. \$16.31.

Q. All right. What is the next one, October? It's on the sheet and if you want to check it.—A. It's hard to see.

Mr. Blythe: If the Court please, counsel for the defendant can read his own figures into the record.

The Court: I think the could read them faster and better. Read them into the record.

Mr. Napier: In the month of October the difference is \$281.08. What's ten percent of that?—A. \$28.11.

Q. November, \$561.32. Ten percent is \$56.13. December, \$467.94 difference; ten percent of that, \$46.94. The next month the difference is \$532.64; ten percent of that is \$53.26. The next month, February, the difference is \$322.70; ten percent of that is \$32.27. March, \$424.32 difference; ten per-
218 cent of that is \$42.43.—A. \$42.00.

Q. I beg your pardon; \$42.32. All right. For April the difference there was \$241.89; ten percent would be \$24.18. Now, will you strike a total there, please, sir?—A. \$299.72.

Q. Assuming this ten percent you testified to, which may or not be correct, but for the purpose of examination assuming that is correct, that is what you lost on your bread, isn't it, Mr. Moore?—A. Yes, sir.

Q. Read that figure again, will you, please?—A. \$299.72.

The Court: I did not follow the period of time covered by your questions. What was the period of time covered?

Q. September 1948 to April 1949, sir.

The Court: All right.

Mr. Napier: Following the month of April, the line went above.

The Court: I see.

Mr. Napier: Now, you gave us some figures in your direct examination covering a period from September '47 through April 1948, did you not?—A. September '47, April—.

219 Q. April '48.—A. Yes, sir.

Q. What was that figure?—A. From September to April was \$21,499.01.

Q. And then the like period in 1949, what was that.—A. \$12,733.40.

Q. All right. You testified before now on this subject—and I refer you to the record, page 10—the figures you have just given you include pastry; is that right?—A. Includes pastry, you say?

Q. Yes, sir. I may have misunderstood you.—A. Well, I—.

The Court: That figure—In that figure did you include bread alone or other products, also?

A. This includes bread alone.

Q. Well, in your previous testimony you testified, Mr. Blythe was examining you, "Now, during the same period of '48, that is from September '48 through April 1949—" Let me go back a little further: "Mr. Moore, when court recessed, you were just in the process of showing what your local wholesale sales of bread were in Santa Rosa during certain periods of 1947 and 1948 and 1949. As I recall, I had just gotten through asking you what were your gross sales of bread at wholesale in Santa Rosa for the period from September 1947 to April 1948. Would you mind repeating your
220 answer?" Your answer was: "\$15,629.37." Now, what was the difference between those two figures, Mr. Moore? What does it represent?—A. I don't remember.

Q. Well, you testified to this. On or about March of 1950 you were still in operation and hadn't lost any of your records then, had you?—A. I suppose not.

Q. So that the figure you gave us then is probably the

correct figure, isn't it?—A. Well, I intended for it to be at that time.

Q. Yes, sir. Isn't that \$15,000 more in line with this big chart we have got here?—A. More in line with what?

Q. In line with what the actual figure was.—A. In reference to what? In reference to what other figure do you mean?

Q. Well, you furnished the information here on your deposition here and you gave us those figures, breads, here they are. Would you show me where there is \$24,000 worth in the period there, the indicated period?—A. Where is the figure \$24,000 you are speaking of?

Q. \$21,499; I beg your pardon. The figure you just gave. The first time you testified, you said it was \$15,629.37.

221 Mr. Blythe: If the Court please, to save time, counsel for the plaintiff will stipulate that the figures Mr. Napier deduced from the chart are the correct figures. The others are a mistake.

Mr. Napier: I didn't understand counsel.

Mr. Blythe: Plaintiff will stipulate that the figures you arrived at from the chart, Plaintiff's Exhibit 1, are correct and that the other figures regarding which you are cross-examining him now are in error.

Mr. Napier: Is this \$21,000 figure he gave on direct examination, is that incorrect?

Mr. Blythe: It is incorrect.

The Court: It is so agreed, and, members of the jury, you may take that stipulation into consideration in arriving at a verdict. Proceed.

Q. Now, then, what does the chart show, Mr. Moore?—A. I don't have it in my hand.

Q. Sir?—A. I don't have it in my hand.

Q. Well, is it \$14,629?—A. That has been agreed it was correct.

Q. That's right.—A. Yes.

Q. All right. And then you testified now during the same period of '48, that is, September '48 through April '49, 222 what was the comparable figure?" "\$12,733.40." "Then

according to those figures, your gross sales of bread at wholesale in the city of Santa Rosa for the period of price cutting in Santa Rosa was \$2,895.94 less than the corresponding period of the previous year; is that correct?" That is to get the difference. Do you want me to give you those figures again? \$15,629.37 and take away the following year of \$12,733.40 and what difference—What do you have left?—A. I didn't subtract them.

Q. You want me to give them again? \$15,629.37, \$12,733.40.—A. \$12,700 and how much?

Q. \$733.40.—A. It would be \$2,855.96.

Q. All right. Now, take ten percent of that and that figure ought to just about agree with the chart, shouldn't it? Is that right?—A. Yes.

Q. Let's see how close we come to it. What did you get?—A. \$285.59.

Q. And the other was \$299 something dollars.—A. Yes, sir.

Q. And that was your loss on bread, is that right?
223 —A. Yes, sir.

Q. Assuming that ten percent is correct. Now, in order for you to make ten percent on bread, you had to produce so much bread, did you not, and sell it?—A. Yes, sir.

Mr. Napier: The first deposition, page 102, 3 and 4.

The Court: I don't like to crowd counsel, but it is taking unduly long with this witness. Let's get on.

Mr. Napier: I'm awfully sorry, sir, but these points are very important, sir.

The Court: Proceed.

Q. On page 102: "How much bread do you have to make and sell with your new plant in order to operate it profitably?" "You mean how many pounds or loaves are run through it?" "Yes; or how many loaves of bread do you feel you have to bake in order to be in the black?" "At least eight thousand loaves a week, pounds." Is that correct or not?

The Court: Was that your testimony? That is the question.

A. That was my testimony.

Q. Was it true then?—A. Yes, sir.

Q. It was necessary to make eight thousand loaves before you could make anything on bread?—A. Yes, sir.

224 Q. That was what you were talking about when talking about bread?—A. Yes, sir.

Q. You weren't talking about pastry or cakes?—A. Yes, sir.

Q. All right, sir. I hand you your deposition—Let me get it a little clearer now. "Now, about what is the margin of profit in bread, assuming that you're baking eight thousand loaves a week?" "Yes?" "A week." "Well, there is very little profit in that amount. I mean net profit. It takes just about that much to cover overhead and delivery expense." "The profit, if any, comes in over eight thousand loaves? In other words, you are about breaking even on eight thousand loaves a week?" "Yes." Is that true?—A. Yes.

Q. If you will use that, Mr. Moore. Now, we took your deposition in July 1949 and you testified you needed eight thousand. That is in excess of thirty-two thousand pounds per month?—A. Yes sir.

Q. So, if you didn't make that much, you didn't make any money on bread, did you?—A. That wasn't an accountant's figure; it was just my idea. I have never been able to
225 have an accountant tell me exactly what—.

Q. Was that approximately right?—A. That was my best estimation at that time.

Q. Well, would you say it was any more than that?—A. Well, I never had my shop analyzed that close enough to tell where the breaking point in my production was, not then or not now.

Q. Well, would you say that testimony is not true?—A. It is still as true as it was when I stated it.

The Court: Mr. Napier, I am going to suggest on this line of testimony, which is entirely proper cross-examination, and going to the question of damages, you ask him the questions and if he contradicts himself, then refer to your deposition. Just cross-examine without regard to what he has testified to. Go into the question of damages as far as you want to. That observation is made to merely expedite matters. Go ahead and cross-examine him.

Mr. Napier: I regret, sir, having to take so much time, but these are tedious points.

The Court: I know, but you can cross-examine the witness without referring to the deposition. Go ahead.

Mr. Napier: Yes, sir.

Q. Now, tell us and give us a figure where your break-even point is.—A. Well, as I said, I can't, because I have
226 never had it figured.

Q. You don't know where it is?—A. No.

Q. It is impossible for you to tell this jury whether you were making money on bread or not?—A. It was impossible for me to tell them where I quit making money, where I started making money, because I've never been able to have an accountant or even a steady bookkeeper, and I did a lot of the work myself, and I took care of my books more or less on the side and I have never had them analyzed that close.

Q. Then that isn't true, then, what you told in your deposition?—A. It was true to the best of my knowledge.

Q. All right. Now, is it to the best of your knowledge?—A. Yes.

Q. All right. Now, take a look at those figures there, Mr. Moore. All right. In order to do eight thousand pounds per week, that called for a dollar volume of \$1,120.00 per week or \$4,480.00 in bread alone per month; that is correct, isn't it.

—A. I don't find those figures.

Q. Well, I am reading figures. You can figure it. Multiply your eight times four to get the month, and multiply
227 by fourteen cents and you would get the dollar volume, wouldn't you, \$4,480.00?—A. Yes.

Q. Is that right?—A. Yes.

Q. You need \$4,480.00. All right. Start right at the top there under bread in your column there, you have "Local Bread," and start in February 1948 and read each monthly figure as you come down.—A. The totals? \$2,000—.

Q. Your bread item right here, white breads, local.—A. \$1,462.00—.

The Court: Call the month as you read the amount.

Mr. Skarda: Is that on the chart, Mr. Napier?

Mr. Napier: I don't know. This is on the deposition.

A. February, \$1,462.73. March, 1,774.94.

Q. Wait a minute. Let's see what you are reading here. It doesn't agree with mine.

(Off the record between counsel and the witness.)

A. April, \$1,701.55. May, \$1,759.38. June, \$2,102.11. July, \$2,132.90. August, \$2,337.79. September, \$1,928.61. October, \$1,709.51. November, \$1,464.85. December, \$1,548.16. January, \$1,304.33. February, \$1,048.31. March, \$1,360.72.

April, \$1,462.01. May, \$1,832.15. June, \$2,108.80.

228 Q. All right. What is your route, then? Come down on your route figures.—A. I beg your pardon?

Q. Your route bread.—A. February 1948, \$326.48. \$842.-88. \$800—I'm sorry; I forgot the month. April \$859.17. May, \$1,042.70. June, \$991.15. July, \$1,198.71. August, \$1,193.38. September, \$1,182.16. October, \$1,251.12. November, \$941.88. December, \$1,359.82. January 1949, \$1,42.66. February, \$1,180.-82. March, \$1,307.88. April, \$1,665.59. May, \$1,676.14. June, \$1501.33.

Mr. Napier: All right, sir.

The Court: I was going to plan on taking a recess in just a moment. We may take a recess now, if you desire. The jury can retire. I want counsel to remain.

(Jury retires.)

229 (Off the record between Court and counsel at the desk.)

The Court: Court's in session. Tell the jury to come in. Proceed with the cross-examination.

Mr. Napier: If I can determine one thing, Your Honor, I believe I can cut through and save some time.

Q. Mr. Moore, have you finished reading the other column?—A. Yes, sir.

Q. Now, I will ask you the general question and you can answer it at one time. Now, you testified under the eight thousand pounds per week and thirty-two thousand pounds per month which was necessary for you to make 4,480 gross

sales, dollar sales, in order to make a profit on bread; that's right, isn't it?—A. Yes, sir.

Q. All right. In February of '48 your gross bread was a little in excess of \$1700; March in excess of \$2500; April slightly in excess of \$2500; are those figures all right?—A. You are adding those?

Q. Yes, sir. Is that correct?—A. As far as I can tell as just glancing at them.

Q. Check them quickly as we go down the line. I am not reading odd dollars. \$2800, \$3000, June 1948, July 1948 ing odd dollars. \$2800, \$3000, June 1948, July 1948, 230 which was getting into your best season, or was your best season, \$3300. In August 1948, \$3500, which was your best month. And September 1948, \$3100 and October 1948, \$2900. And \$2400 in September 1948. December 1948, \$2900. January 1949, \$2400. February 1949, \$2200. March 1949, \$2600. In April 1949, \$3100. And May 1949, \$3500. And June 1949, \$3600. You never did at any time make, then, \$4,480 in bread, did you?—A. Well, you just have Santa Rosa alone here.

Q. All right. That includes Santa Rosa alone?—A. Yes, sir.

Q. Now, strike your average—Now, state what your monthly sales were on your route and tell us what that would be.—A. Well, it would take some time to figure it, to figure an average.

(Off the record between counsel and the witness.)

Q. I was reading both, a combination of the local and the route. I have given you the total of the local and the route which was all of the white bread business you did. The figures I gave you.—A. Yes.

Q. And you never did at any time reach the four thousand four hundred and eight dollars?—A. Not of bread alone.

Q. All right. But the eight thousand pounds we 231 were talking about, we were talking about bread, weren't we?—A. Yes.

Q. And, therefore, you didn't make any money on bread at any time between February of '48 and June of '49?—A. Figuring those figures, that figure you were quoting, I estimate I had to sell—.

Q. Using the eight thousand pounds.—A. The eight thousand pounds.

Q. That's right.—A. I didn't.

Q. You didn't make any profit on that?—A. On bread alone?

Q. That's right.—A. Using the eight thousand pounds figure?

Q. That's right.—A. Yes.

Q. You didn't make any money, did you?—A. Not by using the eight thousand pound figure.

Q. Now, what was the long profit item in your business?—

A. Well, bread is the long profit item if you handle more of it, and I did.

Q. I mean per unit produced, what item afforded the biggest profit?—A. Bread. Only it depends on the
232 volume.

Q. All right, Mr. Moore. You make more money on pastries, don't you, per item?—A. I beg your pardon?

Q. You make more money on pastry, don't you, per item?—A. Well, make more off pie than you would off the small loaf of bread.

Q. If you have enough bread business, of course, if you had had all the bread business in New Mexico and just had the pastry business in New Mexico, you would probably make more on bread. But right there where you were situated, the volume of business you had on bread produced no profit, but you did produce some profit in your pastry business, didn't you?—A. Yes.

Q. That's correct, isn't it?—A. Well, I would have to refer to my daily returns. Is that what you are referring to?

Q. We are going to have it, but what I am saying is you actually didn't make any money on the bread you were selling.

—A. Well, you are going back as though this eight thousand pounds was a definite figure, set up as a definite figure.

Q. I ask you, if it isn't right, tell us now what is
233 right.—A. I said before I couldn't say what was right.

Q. All right. If you don't know what is right, how can you say you make ten percent on bread?—A. That is a figure that you hope with efficient operation and no interference that you try to arrive at.

Q. All right. Then that was merely a hope figure, that

ten percent of gross business, wasn't it?—A. It was in my case.

Q. Yes, sir. All right. Okay. So, you don't know whether you made any money on bread or not, do you?—A. What do you mean?

Q. Do you know whether or not you made any money or profits on your bread sales?—A. At what period?

Q. The year '49—The '48 and '49, those two years. Do you know whether or not you made any profit on that bread?—A. I know by my income tax I didn't make much.

Q. You didn't make much profit period. Do you know you made some profit in your bread business?—A. It is just like I said, I never had any accountant to analyze my books to
234 separate a loaf of bread from pie where I could point
to a figure and say this is the correct figure.

Q. Then you don't know whether you made any money in the bread business or not, do you?—A. I only know I went broke in the bread business.

Q. You don't know whether you made a dime in the bread business during the years '48 and '49, do you?—A. Well, my income tax return—.

Q. I didn't say that, sir. I said do you know whether or not you made any money in the bread business during the years 1948 and 1949?—A. No; I made very little.

Q. Did you make any profit? Do you know that to be a fact?—A. I can't put my finger on a figure.

Q. Then you don't know whether you made a profit or not, do you?—A. Well, I have a good idea.

Q. Do you know whether or not you made any profit in bread back in 1947?—A. Well, that goes back to the question—.

Q. Answer my question, Mr. Moore, please.—A. As I said—.

Q. Answer the question, please.

Mr. Skarda: May it please the Court, the witness has a right to qualify his answer any way he sees fit.

235 The Court: Go ahead and answer in your own words.

A. If I answer yes or no, it has a big difference.

The Court: Make any explanation you desire.

A. All right. You asked if I knew whether I made any money in '47.

Q. That's right.—A. Well, the only figure I could give you would be my income tax and it showed a small profit.

Q. But you don't know whether you made it in the cake business or pastry business or made it in the bread business, do you?—A. I never had them separated; I can't put my finger on it.

Q. You don't know, do you?—A. In my own mind, I know.

Q. I didn't ask you that. Do you know, sir?—A. I will have to say no.

Q. You don't know.—A. Because I never had it separated where I could put my finger on the figure and say in my own mind "I know the situation and I know what happened." But like I say, I couldn't have nothing but my income tax returns to show.

Q. So you don't know whether you made a dime in the bread business in 1947, 1948 and 1949, do you?—A. Well, I have to refer to my income tax—.

236 Q. Answer the question, sir.—A. How can I answer it when I don't have any figure to answer it with?

Mr. Standley: Your Honor, we believe he has already answered the question. He is being repeatedly badgered on the same question. He said he couldn't tell.

Mr. Napier: If counsel agrees the plaintiff doesn't know, that is all I want to know. If counsel will agree to that, I will pass on.

The Court: Let the witness answer this last question, if you can, whether or not you made any profit in the bread business in the years 1947, '48 and '49.

Mr. Standley: That wasn't the question he asked, was it?

The Court: You can answer the question.

A. That question?

Q. Do you know whether or not you made any money in the bread business as distinct from the cake business and the pastry business during the years 1947, 1948 and 1949?—

A. I only have a record—.

Q. Answer the question.—A. Well, can I explain my answer?

The Court: Yes.

237 Q. Go ahead.—A. I only have a record of my bread sales separate from cake and pastry only during this period of price discrimination. That is the only record I have of the separate ones, and I cannot say that I don't know because I have a good idea, and I can't say I do because I have never had it—I don't have a figure to put my finger on to show it.

Q. Then you just don't know, do you?

Mr. Skarda: May it please the Court—.

The Court: I think he has explained the situation. Proceed with the examination.

Q. Now, during the year 1946, Mr. Moore, we had sugar rationing, didn't we?—A. Yes, sir.

Q. You could put a tablespoon of sugar in anything and sell it, couldn't you? There wasn't any such thing as a stale in 1946 and 1947 of sugar items.—A. I didn't get in on much of that, because sugar began to come back on the market.

Q. You had sugar rationing in '46.—A. Yes.

Q. And you had your allotment, probably more than, or otherwise.—A. I don't think so.

Q. I don't ask you whether you did, but that was a very profitable period from the standpoint of sugar items,
238 pastry and cake.—A. Yes, sir.

Q. Almost anything would sell?—A. Yes, sir.

Q. There wasn't any such thing as a stale, was there?—
A. Well, they weren't as great as they are now.

Q. And prices were controlled, were they not, ingredients prices were controlled, sugar included?—Yes, sir.

Q. And prices were good, weren't they?—A. Yes, sir.

Q. And it was a very, very profitable business, wasn't it, throughout the industry?—A. Yes, sir.

Mr. Napier: Would you gentlemen like to look at these before I show them to the jury?

(Off the record between counsel.)

Mr. Skarda: What are they made from, Mr. Napier?

Mr. Napier: Taken from the balance sheets here and the income tax return and the profit and loss statements made to the RFC.

(Off the record between counsel.)

Mr. Skarda: What do you propose to do, Mr. Napier?

Mr. Napier: I want to prove about two points with those about as quickly as I can.

239 The Court: Proceed, and let's get started.

Mr. Napier: Are they agreeable now?

Mr. Skarda: Agreeable to what?

Mr. Napier: That they truly are representative of what we have here on the table.

Mr. Blythe: No; we can't agree to that. You will have to put on your testimony as to how it was prepared.

Mr. Napier: It is merely a reproduction of these instruments here, Mr. Blythe. Shall I do that, or split my testimony with Mr. Moore?

Mr. Skarda: Mr. Moore is not an expert accountant. He testified he hasn't had the benefit of an expert accountant.

The Court: If you cannot agree, proceed with your questions.

Mr. Napier: All right.

Q. Mr. Moore, I will ask you to tell me whether or not that is a correct reflection of your balance sheet written to the RFC in connection with your loan application, dated May the 15th or May the 16th, whichever date is correct on here.

The Court: I take it is going to take a good deal of time to make those comparisons and I just cannot permit that much
240 time to be taken. If you had someone to make these charts, you can have them identify them. I can't have this witness take the time to prepare them.

Mr. Napier: May I recall this witness at that time?

The Court: For further cross-examination?

Mr. Napier: Yes, sir.

The Court: After you have identified them.

Mr. Napier: Yes, sir.

The Court: Yes. Any more from this witness at this time?

Mr. Napier: Just a moment, sir. Let me check here and see. May I make this statement to the Court? The testimony with reference to the loss of value of the plant must await the identification of these instruments.

The Court: Proceed with your questions now.

Mr. Napier: With the understanding we may return to that, we will pass that point, and with reference to goodwill.

Q. Mr. Moore, let me give you one thing here. You testified with reference to your annual sales. If you will come down here, please. You testified \$37,425.62 for the year 1946; is that right? You testified—I didn't understand.—A. Is that taken from my income tax return?

Q. Yes. You testified for '47, you testified for
241 1947, \$47,742.63 and \$58,240.25 for 1948, and \$74,000.00
for '49.—A. Well, that took in an extra month.

Q. So that would be about \$70,000.00.

Mr. Standley: If the Court please, his figure here isn't what it represents to be.

Mr. Napier: Well, we will show you that.

The Court: The witness may make any statement about it he desires.

Mr. Napier: Sir?

The Court: I say the witness may make any statement about it he desires.

Q. On July the 31st, which was your half year.—A.
Yes.

Q. —you reported \$35,000 as being your gross sales for that year; is that right?—A. Yes, sir.

Q. All right. Since you have testified, then, there will be

an extra month and it will run what—about \$70,000.00—is that thirteenth month in 1949?—A. I don't understand you.

Q. Run about \$70,000.00 for 1949, eliminating the thirteenth month?—A. Approximately.

Q. So, the, that \$70,000.00 would be placed about
242 right here opposite our \$70,000.00 mark. You are familiar with these charts, aren't you?—A. Yes, sir.

Q. So let's put our mark here for \$70,000.00 for the end of '49. Now, is this point here for 1946 in about the right place, \$37,000.00?—A. Yes, sir.

Q. Is it about the right place for '47?—A. Yes, sir.

Q. Is it about the right place for '49.—A. Yes, sir.

Q. All right; is it about the right place for the end of 1949?—A. Yes, sir.

Q. This \$70,000.00. Would you take this and connect up these lines since you are familiar with these charts, and show just how that goes?

(Witness complies.)

Q. Now, will you show it to the jury? That fairly represents the growth of your business, doesn't it, Mr. Moore.

The Court: Take the stand, Mr. Moore.

Q. Does that fairly represent the growth of your business?—A. Overall business; yes, sir.

243 Q. And in 1946 you made how much profit?—A. I made \$5,013.00 and some cents, 62, I believe.

Q. In 1947 you made how much profit?—A. \$1,457.57.

Q. All right. In 1948 you did \$58,000.00 worth of business. How much profit did you make?—A. \$107.59.

Q. And in—for the half year—May I use that, please?—for the six months period from January 31, 1949, until July 31, 1949, you did how much business, now?—A. \$35,632.66.

Q. And you did—and how much did you make on that, or how much did you lose?—A. A net loss of \$356.42.

Q. Now, the more business you did, the less your profit, and you finally, when you got to doing a substantial amount of business, you started showing a loss.—A. According to your figures.

Q. My figures, or are they your figures?—A. According to the way you figure it, I will say.

Q. Are those your figures, or not?—A. Yes, sir; these are right.

Q. Then, it reflects a loss, doesn't it?—A. Yes.

Q. A loss of profits each year.—A. Yes, sir.

244 Q. Get lower and lower each year.—A. Yes, sir.

Q. And business kept getting better and better, going up, to a greater value?—A. Yes, sir.

Q. This line is pretty straight, isn't it, Mr. Moore?—A. Yes, sir.

Q. There isn't any break in that line, show a ten thousand dollar gain the first year it is on there; is that right?—A. Yes, sir.

Q. And show a ten thousand dollar gain the next year?—A. Yes, sir.

Q. And show a little bit better than ten thousand dollars gain the next year, which would be the year 1948; is that right?—A. Yes, sir.

Q. But had a little price increase along in there some place, didn't you?—A. Yes, there was a price increase.

Q. And then in '49 where you did \$70,000.00 worth of business, that was a little bit better than a ten thousand dollar gain?—A. Yes, sir.

245 Q. And had a little price increase there. There wasn't any in '49.—A. I don't remember.

Q. Well, all right. Maybe there wasn't. Then, you have had a pretty steady growth, pretty even every year?—A. Overall business; yes, sir.

Q. Yes, sir. From the very beginning, from the time you opened your shop in Santa Rosa when you returned from the Army until the end of 1949 and the first of 1950.—A. Yes, sir.

Q. When you closed your shop; is that right?—A. Yes sir.

Q. So there hasn't been any loss of business reflected by this, has there? This doesn't reflect any loss of business, does it?—A. Well, it does, because, as I showed on my chart, my business was gaining the year before this price cut and it would have been higher than what you have there had it not been for the price cut.

Q. All right. Before the boycott you did \$37,000.00 the

first year and 1947, the next year, that was before Meads ever came on the place,—A. Yes, sir.

Q. —ever got close to you, you did some \$37,000.00
246 through '47?—A. Yes.

Q. Then in '48—that was still before Meads ever came on the place—you did fifty-eight?—A. Yes.

Q. And that was another ten thousand?—A. Yes.

Q. Then the next year you gained another ten thousand?
—A. Yes.

Q. So, it has been the same every year, hasn't it?—A. My overall business?

Q. Yes.—A. My volume.

Q. It has been about the same every year?—A. Yes, sir.

Q. As a matter of fact, it was a little bit better after the price cut, wasn't it?—A. Yes.

Q. All right. Now, one question: Will you take a look at your balance sheet dated January 31st, 1948? That was before Meads came on the place, wasn't it? Now, then, what was your current assets on February the 31st, 1948? That was the month that Meads came in.—A. This balance sheet is January the 31st.

Q. Sir?—A. This balance sheet is January the 31st.

247 Q. January the 31st, '48.—A. I thought you said February.

Q. Which would cover the period before Meads came in. That was the first month they were there.—A. Assets? Is that what you asked for?

Q. Yes, sir.—A. \$18,000.00.

Q. No; your current assets.—A. \$2,087.28.

Q. All right. What was your current liabilities.—
A. \$2,756.84.

Q. Were you able to pay your debts then?—A. Yes, sir.

Q. All right. Now, turn to 1949. July the 31st, 1949. Now, tell us what your current assets were then. First, though, that was after the price was increased, two or three months after the price was increased?—A. \$3,273.17.

Q. All right. State your current liabilities.—A. \$9,653.00—.

Q. No, your current liabilities. You have a RFC note in there that wasn't all due; that was a ten-year loan, wasn't it? Take your current liabilities.—A. Current liabilities?

248 Q. Yes, sir.—A. That's what it reads.

Q. Well, shouldn't you take out that RFC note? That wasn't all due immediately, was it? That was secured by a loan on your machinery and equipment. Your other debts at the time—your other debts, other than the RFC loan.—A. It says total current liabilities, what I started to read.

Q. Eliminate that item now.—A. \$3,210.00.

Q. All right. What were—I am sure the jury has forgotten—what were your total current assets?—A. \$3,273.17.

Q. You were solvent then and you could pay your bills, couldn't you?—A. Well,—

Q. You could pay your bills at that time, couldn't you?—A. Yes.

Q. At that time in 1948, now, before Meads ever came on the scene, January the 31st, 1948, what was your net worth, the net worth of your business?—A. \$18,319.62.

Q. Your net worth, not your total assets and liabilities.—A. Grand total liabilities and net worth—

(Off the record between counsel and the witness.)

Q. Well, let me have it. We will go back into that presently. Let me ask you this one question. Then, in July after prices were raised, you were solvent and you were able to pay your bills then, weren't you?—A. No, I was behind with bills then.

Q. You were able to pay your bills then, weren't you? Well, look at it again, Mr. Moore. This is your statement, now.—A. What year are you inquiring about now?

Q. July 1949. You were able to pay your bills then, weren't you.—A. I had no cash.

Q. You had some materials and some bread and other quick assets there that matched your immediately due liabilities, didn't you?—A. Yes.

Q. All right. So you could pay your bills, couldn't you?—A. I could have by probably selling out, closing out.

Q. That's right.

Mr. Napier: Subject to the value of the plant, I am through with this witness.

250 The Court: Any redirect examination?

Mr. Blythe. If it please the Court, just a few questions. I will make them as brief as possible.

Redirect Examination by Mr. Blythe.

Q. Now, with reference to this RFC loan, were you making the payments on those loans?—A. Yes, sir.

Q. On that loan, rather. How many years did you spend in assembling the equipment you had when you went out of business?—A. I beg your pardon?

Q. How many years did you spend in assembling the equipment you had when you went out of business?—A. It took me practically all of 1947.

Q. Well, did you have any equipment before then?—A. Yes, but—I had the equipment I opened up with.

Q. When you opened up originally?—A. Originally?

Q. Yes.—A. You mean before the war or after the war?

Q. Before the war.—A. It was July 1940.

Q. Now, how do you explain how, although your
251 gross income of your business continued to go up, your net profit continued to show a decline?—A. When would you like for me to start?

Q. Well, Mr. Napier has had you draw a graph showing your gross income of your business went up steadily from 1946 until the last year you were in business, through '49 and early 1950. How do you explain the fact that—to which you have already testified—that your net income went down while gross income went up during that period?—A. From '46 when I came back from the army and opened up with the same equipment I had and didn't buy any more, it was already set up, I just opened up and started baking and operated through the year '46 in that way and had no unnecessary overhead, advertising expense or truck expenses. And in 1947 when I decided it was necessary for me to put in this new equipment and I started—my overhead and expenses immediately increased and my delivery expenses increased and I got other trucks and opened up other routes and my advertising went up and my freight on equipment went up. I had to make different trips to different places to see about other equipment. And that was overhead expense. It cost me four hundred and fifty dollars just to wire the new equipment when I set it up. That went on all during 1947. And even

though my volume was growing, my overhead expense and these miscellaneous expenses were cutting in on my
252 profit. And that's why that happened like that in '47.

Then in '48, as I just got set up and got my shop to operating, it takes machinery—it takes some time to get machinery and start making a new loaf of bread and get to operating efficiently—and just about the time I got in shape to do that, this price cut came along, and then I had to go through those months with my business, the heart of my business, the profitable part of my business, cut down to where I couldn't make any profit. And during that time I bought another truck and sent it out of town to try and build a route to keep my volume up in the shop. And this truck route, I had no capital to operate on, and advertising as much as I could, did the things I could, but didn't have the capital to make this a paying route, and it likewise lost me money. And all those expenses were necessary to build a business and to make your volume grow. They were costing me more to do it than I was getting out of it. It was taking all of my profit.

Q. Mr. Moore, with respect to these routes you established after Meads Bread Company cut prices in half, would you have established those routes had it not been for the price cutting?—A. No.

Q. And it is your testimony those routes cost you money?
—A. Yes, sir.

253 Q. Now, with respect to what counsel for the defendants have called your hope figure of ten percent you hoped to make, I ask you whether or not that is an average figure—.

Mr. Napier: Your Honor, we object to him leading the witness.

The Court: Yes, it is leading, but he may answer.

A. What is the question again?

Q. With respect to your ten percent profit, that is ten percent of your gross that you previously testified to, that you expected ordinarily, customarily to be net profit, I ask you whether or not that figure was common in the baking industry.

Mr. Napier: We object, Your Honor.

The Court: It's repetition.

Mr. Napier: Because the industry isn't on trial, it is what this man would have made.

The Court: It is repetition of the direct testimony. Proceed.

A. Yes.

The Court: You will not consider that answer. I sustained the objection.

A. I'm sorry.

The Court: Merely because it is repetition.

Q. Now, with respect to Plaintiff's Exhibit 1, Mr. Napier, I believe, had you subtract the figures for the price
254 war period from the corresponding period of the preceding year, did he not?—A. Yes, sir.

Q. Do those figures correctly represent, that is the difference in those figures, correctly represent your loss of sales during that period?

Mr. Napier: We object. He is trying to impeach his own witness.

The Court: Overruled.

Mr. Napier: He has already testified, Your Honor, it does.

The Court: Overrule the objection. He may answer.

A. It represents just what it says on the chart.

Q. Let me put it another way. This line that starts here at about the \$2100 figure on the left hand side represents your sales in the period early 1947 and early 1948, doesn't it?

Mr. Napier: It's repetition.

The Court: I didn't get his answer. Answer the question.

A. Yes, sir.

The Court: All right.

Q. Do you have any reason to believe that your sales during the period of the price war would have been above
255 or below the line represented by the preceding year?

Mr. Napier: We object; what this man might have believed invades the province of the jury and is just a conjecture on the part of the witness.

The Court: Overruled. Answer the question. The question was do you have any reason.

A. Yes, definitely.

Q. No; did you have any reason.

The Court: To believe? You understand the question?

A. Not since it has been—.

The Court: All right. State the question again.

Q. Do you have any reason to believe, based on your business experience and the tendency of your sales toward the latter end of this period represented by the top line on the chart, do you have any reason to believe that your sales for the year, for the next year, would be any greater or lesser than the period represented by that line?—A. They would definitely have been greater.

Q. Now to come back to my original question. Would the difference between the two lines on this graph accurately represent your total loss of sales during that period over what they should have been if there hadn't been any price war?

256 Mr. Napier: Your Honor, he is arguing with his own witness and it is repetition.

The Court: He may answer.

Mr. Napier: Exception.

A. No; if it had not been for this, this line, I am sure, would have been up higher than this.

Q. You are pointing to the red line?—A. This here.

Q. Represented by the red line?—A. Represented by the red line. I am sure it would have been greater than the year before because I had got my shop operating and got my business more established and it was growing all the time. And I'm sure this year would have been more than it was had it not been for the price war.

Q. Now, with respect to these exhibits, the photostats that have been introduced in evidence by the Defendant, I

ask you whether or not you voluntarily gave permission to the defendant to secure copies of those records.—A. I did.

Q. I call your attention to the photostate which is a copy of your letter of April 24th, 1947, to the RFC in which you made your original approach to them for a loan. Do you recall that letter?—A. Yes, sir.

Q. I believe you testified in that letter, as brought
257 out by counsel for the defendant, that the value of your factory then was twelve thousand dollars; is that right?—A. Yes, sir.

Q. That was before or after the RFC loan?—A. That was before.

Q. Was that before you bought all this additional equipment?—A. Yes, sir.

Q. After you bought your additional equipment, your new equipment—In what part of 1947?—A. It was strung all through. It never all came at once. There was some of it I even made arrangements for in '46 and paid for it after I got the RFC loan. And then I got it in as I could find it and buy it and get the RFC to pay for it.

Q. Now, counsel for the defendant has asked you about the cakes you shipped in from California. I ask you whether or not you bought and paid for those cakes upon delivery.—A. Yes, sir.

Q. Did you have the right to return any of those cakes that were not sold?—A. No, sir.

Q. They were not sent to you on consignment, then?—A. No, sir.

258 Q. Then I believe Mr. Napier referred to your profit on that business as a commission. I ask you whether or not that is truly a commission.—A. No, sir, it isn't a commission.

Q. Now, Mr. Moore, I ask you whether or not you ever heard of other price cutting in the bread business. I ask you whether or not you ever heard of a baker cutting the price of bread in half and keeping it there for eight months.—A. I have never heard of it before. I have heard of dropping one cent and two cents and three cents, but I have never heard of anyone cutting the price half in two and holding it down when their competition didn't meet their price.

Q. In the kind of bakery that you were operating, does your business consist of just one type of sales? I mean, do

you rely on sales of any one thing, or on all sorts of products?

—A. I had to make as much as I could on all of them.

Q. Did you rely upon sales of bread alone to make a profit?—A. No.

Q. Mr. Moore, do you have any reason to believe that the
—Strike the question. Mr. Moore, what did you consider
your profit to be per loaf of bread in the bakery business
259 you operated?

Mr. Napier: Now, that calls for a conclusion of the witness.

The Court: Well, if he knows what his profit was on a loaf of bread, he may testify.

Mr. Napier: May I complete my objection for the purpose of the record?

The Court: Yes.

Mr. Napier: It invades the province of the jury, it isn't established he made a profit, could have made a profit, he doesn't limit the time, nor does he show what elements go into the making up of a profit in the bread business or in his particular case what he is taking into consideration.

The Court: I think, Mr. Blythe, this testimony would have been proper on direct examination. This is redirect examination and there was nothing, as I recall, at all testified or questioned about on cross-examination as to profit on an individual loaf.

Mr. Blythe: If the Court please, the witness has testified at some length on cross-examination regarding whether he made a profit or not.

The Court: He said he didn't know. That was the substance of his answer. If he doesn't know about profit on bread,

I don't see how he can testify as to the profit on a
260 single loaf. But he may if he can. Can you answer the question?

A. Yes, sir.

The Court: Answer the question.

A. As I understand, it is a different question than what you were thinking of.

The Court: He has asked you about the profit on a loaf of bread.

Mr. Blythe: We will withdraw the question, if the Court please.

The Court: All right. You may go.

(Witness excused.)

261 The Court: Court will be in session. Tell the Jury to come in.

Mr. Standley: Your Honor, we would like to read the deposition of Billy Mead as an adverse witness.

The Court: Whose deposition is this?

Mr. Standley: Mr. Billy Mead.

The Court: Is he present?

Mr. Standley: No, sir. I assume he isn't. He hasn't been all day.

The Court: Any objection to the reading of the deposition? Proceed.

Mr. Standley: Your Honor, we will only read portions of the deposition. There will be some omitted.

The Court: You may offer such parts as you desire, but all will be subject to introduction if the defendants desire to introduce it.

BILLY O. MEAD, after being duly sworn, testified as follows:

Direct Examination by Mr. Blythe.

Q. State your name.—A. Billy O. Mead.

Q. Are you the president and one of the stockholders and incorporators of the Mead Service Company?—A. Yes, sir.

Q. Also Mead's Fine Bread Company of Clovis?—A. A stockholder and vice-president of Mead's Fine Bread
262 Company in Clovis.

Q. Do you have a similar position in the Mead's

Fine Bread Company of Roswell?—A. Yes, sir, vice-president and a stockholder.

Q. But not a director?—A. Sir?

Q. But not a director?—A. Yes, a director.

Q. And then the Lubbock corporation?—A. President and stockholder and a director of the Lubbock corporation.

Q. Are you a stockholder in the Mead's Fine Bread Company of Big Spring?—A. Yes, sir.

Q. But not an officer or director?—A. A director.

Q. But you are president of the Clovis.—A. Vice-president of the Clovis corporation.

Q. What position does Mr. Corcorran of Roswell hold in the Clovis corporation?—A. He is a vice-president.

Q. I thought you said you were vice-president.—A. We have two, I think.

Q. Who is president?—A. W. L. Mead.

Q. Is he president of both the Mead's Fine Bread
263 Company of Clovis and the Mead Service Company?

—A. No, sir. I am president of the Mead Service Company. He is president of the Mead's Fine Bread Company of Clovis.

Q. Are you familiar with the articles of incorporation of the Mead Service Company?—A. Not very.

Q. Do you know the purposes for which the corporation was organized and as stated in the articles of incorporation?

—A. Just generally.

Q. What are they in general?—A. I think that they are to authorize Mead's Service Company to do business, baking and selling and service work.

Q. Does it exercise all of those functions?—A. No.

Q. Which functions does it exercise?—A. It exercises service functions; training.

Q. Training of personnel?—A. Training of personnel.

Q. It does not manufacture or sell bread then?—A. No, sir.

Q. Isn't that sort of an overlap there? You have two corporations authorized to do the same thing; isn't that correct, both authorized to operate the Clovis plant?—A. No, not necessarily.

264 Q. Do you know whether or not the articles of incorporation authorize both companies to operate the plant?—A. Not the Clovis plant.

Q. Do you know whether or not both articles of incorporation authorize both companies to sell bread?—A. Yes.

Q. And do they?—A. No, sir. The service company does not sell bread.

Q. Well, it is authorized to?—A. Authorized to, yes.

Q. Did you have anything to do with the decision to sell bread in Santa Rosa at half the usual price?—A. No, sir.

Q. Did you know that it was going to be put into effect before it was?—A. No, sir.

Q. Who made that decision?—A. Mr. Corcorran.

Q. Then did he notify you?—A. He told me about it later.

Q. Do you know when that order went into effect?—A. No, sir, I don't exactly.

Q. Was it about the middle of 1948?—A. I think so.

Q. Was that order recently rescinded?—A. Recently what?

Q. Rescinded.—A. Yes. In the past few weeks, I think.

Q. Do you know what date?—A. No, I don't.

Q. What is the wholesale price of bread in Santa Rosa, New Mexico, at the present date?—A. Our wholesale price in Santa Rosa is fourteen cents a pound.

Q. That is the price you charge to all of the retail outlets there; is that right?—A. That is right.

Q. Have you ever been in Santa Rosa?—A. Been through there.

Q. By the way, who made the decision as to whether or not you would sell bread in Farwell, Texas, from the Clovis plant?—A. When was that, Mr. Blythe?

Q. Well, let me start in from the beginning. When you took over the Clovis plant and started operating it, you had a route going over to Farwell, did you not?—A. Yes, sir.

Q. And how long was that route continued?—A. I don't really know. Quite sometime, I think. About a year. I am not sure at all.

Q. On whose orders was it discontinued?—A. Mr. Corcorran's.

Q. Do you know the reasons for that order?—A. Vaguely. He put it on a route that we have that comes up pretty close to Farwell.

Q. You have a route to Texico from Clovis, don't you; always have had?—A. Yes.

Q. I mean since you started operating that plant.—A. Yes.

Q. And Texico and *Farewell* are just on opposite sides of the state line, aren't they?—A. Yes.

Q. Now, is it not true that the decision to discontinue selling bread in Farwell was caused by fear by the officers of the corporation that you might be held *bo* be in interstate commerce?—A. Yes, partly.

Q. When was the operation of the delivery route in Farwell resumed; do you know, approximately?—A. I don't know. I just don't know.

Q. Was it in 1948?—A. It was either the latter part of '48 or the first of '49. I am not sure.

Q. You are still operating that route, are you not?—A. Yes, sir.

267 Q. Is the Clovis plant now operating on a 40-hour week?

Mr. Napier: We object to this, Your Honor.

The Court:—I sustain the objection to all questions concerning the 40-hour week.

Mr. Standley: May the Court indulge me a minute until I find out where those end.

Q. You have heard the testimony of your brother, Mack Mead, with regard to the corporate organization and capitalization of all of these various corporations. Did you note any errors in his testimony?—A. No, I didn't.

Q. As far as you know, it is all correct then?—A. There is only one thing and that's about our general price of fourteen cents. The weight law difference in Las Vegas would make the price a little different up there. That is the only thing.

Q. Would you mind repeating that? The weight loss difference?—A. The weight law difference. We have a different sized loaf of bread, so the price is different in Las Vegas.

Q. New Mexico. What is the scale there?—A. It is fifteen cents for an eighteen-ounce loaf.

Q. You manufacture a special loaf for Las Vegas; is that right?—A. Well, it is sold in Las Vegas and sur-

268 rounding territory as the prevailing size of loaf up there.

Q. But that is approximately the same as fourteen cents for a sixteen-ounce loaf, is it not?—A. A little cheaper.

Q. What is the price charged by other bakers selling bread in Las Vegas?—A. I imagine it is the same. I couldn't say for sure. There could be some cheaper bread there; probably is.

Q. Is the bread delivered in Las Vegas delivered from your Clovis plant or from Albuquerque?—A. Clovis plant.

The Court: Do you desire to introduce any of the testimony of this witness; cross-examination or parts omitted?

Mr. Napier: Not at this time.

The Court: This is the time to do it, if ever.

Mr. Standley: Your Honor, he had a cross-examination. I will read it.

Cross-Examination by Mr. Napier.

Q. What position do you hold in Clovis?—A. Vice-president.

Q. How old are you?—A. Twenty-nine.

Mr. Napier: That is all.

Mr. Standley: Your Honor, we offer the parts of Billy O. Mead's deposition that have been just read from
269 the stand.

The Court: Admitted. Call your next witness.

270 Mr. Blythe: If the Court please, the plaintiff would like now to call Mack Mead, and have permission of the Court to examine him as an adverse witness under Rule 43.

The Court: You are entitled to. Take the stand. Were you sworn this morning?—A. No, sir.

MACK MEAD, having been first duly sworn, testified as follows:

Direct Examination by Mr. Blythe.

Q. State your name.—A. My name is Mack Mead.

Q. Where do you live, Mr. Mead?—A. I live in Lubbock, Texas.

Q. Are you one of the incorporators of the Mead Service Company, a corporation authorized to do business under the laws of the State of New Mexico?—A. Yes, sir.

Q. Who are the other incorporators of the Mead Service Company?—A. Billy O. Mead, Edward Napier.

Q. Who are stockholders of the Mead Service Company?—A. Myself, Mack Mead; E. E. Corcoran, Billy O. Mead, and Alexander K. Miller.

Q. What about W. L. Mead?—A. W. L. Mead, I beg your pardon.

271 Q. Where do these other people live you have mentioned besides yourself?—A. Mr. Miller lives in Roswell, New Mexico, Mr. Corcoran lives in Lubbock, and Billy Mead in Lubbock, and W. L. Mead in Big Spring, Texas.

Q. What is the amount of capital stock?—A. The amount of capital stock is \$2,000.

Q. What are the respective interests of these stockholders you name?—A. You mean the amount of the stock, the percentage of the stock, the percentage of the ownership, Mr. Blythe?

Q. Yes.

Mr. Napier: Let's fix the time for this, Your Honor.

The Court: I don't see any point in that. If they are stockholders, that is all you intend to show, isn't it, Mr. Blythe?

Mr. Blythe: If the Court please, I want to show these companies have common majority stockholders.

The Court: Well, you have shown they were all stockholders. I think that is sufficient. Proceed.

Q. You are—who are the officers of this company?—A. Do you wish me to answer your other question?

Q. No.—A. Oh. Would you repeat?

272 Q. Who are the officers of the Mead Service Company?—A. Billy Mead is president, and I am Secretary-Treasurer, and Mr. Corcoran is vice-president.

Q. What office does A. K. Miller hold, if any?—A. He is a director of the corporation.

Q. Who are the directors besides Mr. Miller?—A. The other stockholders.

Q. What are the functions of the Mead Service Company?—A. The principal function of the Mead Service Company is to train personnel in the field of selling, in the field of production and baking of bread, and the merchandising of bread.

Q. Do you know the various functions that the company is authorized by its certificate of incorporation to perform?—A. Yes, sir, generally.

Q. Do you know whether or not the certificate of incorporation authorizes the Mead Service Company to bake bread and other bakery products, and to sell the same?—A. I think it does, Mr. Blythe.

Q. If I understand correctly, the Mead Service Company doesn't actually fulfill all these functions. Is that right?—A. No, sir, not at that time, not all of them.

Q. It merely acts as a training organization?—A. That is the principal purpose.

Q. How many corporations do you have in New Mexico?—A. I am interested as a stockholder in three corporations in New Mexico.

273 Q. What are their names and where are they domiciled?—A. Mead's Fine Bread Company of Clovis, and Mead's Fine Bread Company of Chaves County in Roswell. I beg your pardon, there are just two. I'm sorry.

Q. And you have one in Texas, do you not?—A. Yes, sir, I was thinking of that.

Q. What is the name of it?—A. Mead's Fine Bread Company in Lubbock, Texas.

Q. Which of these corporations actually operates the bakery in Clovis?—A. The Clovis corporation. It is a New Mexico corporation.

Q. Mead's Fine Bread Company of Clovis?—A. Mead's Fine Bread Company, a New Mexico Corporation, I believe is the correct title, correct name for it.

Q. Has that name been changed recently?—A. No. But its name is Mead's Fine Bread Company. It is a New Mexico corporation.

Q. It isn't known as Mead's Fine Bread Company of

Clovis?—A. Well, technically, it wouldn't be. Because it says Mead's Fine Bread Company.

Q. Who are the incorporators of the Mead's Fine Bread Company domiciled in Clovis?—A. I am an incorporator, and Billy O. Mead, and E. E. Corcoran.

Q. Who are the stockholders?—A. The stock-
274 holders are Mack Mead and E. E. Corcoran and Billy O. Mead and W. L. Mead.

The Court: Will counsel approach the desk a moment? I have an idea we might shorten this suit.

(Off the record.)

The Court: State that in the record in the presence of the Jury and let them hear that.

(Off the record.)

The Court: Make the statement about the time and see if you can't agree to it.

(Off the record.)

The Court: Mr. Napier objects to the stipulation in the presence of the Jury. Bring your book up here, Mr. Reporter.

(Out of the hearing of the Jury.)

The Court: Now, what do you agree?

Mr. Skarda: It is hereby stipulated by and between plaintiff and the defendants by and through their respective counsel that the defendants operated a bread route from Clovis, New Mexico, to Farwell, Texas on a regular schedule from September 18, 1946, to January 16, 1948; and from December 27, 1948, until the winter of 1951.

The Court: You agree to that, Mr. Napier?

Mr. Napier: I think during the year of '51.

Mr. Skarda: Until the latter part of the year of 1951.

275 Mr. Napier: That is all right.

The Court: You agree to that, do you, Mr. Napier?

Mr. Napier: Sir?

The Court: Do you agree to that?

Mr. Napier: I think that is substantially correct, yes, sir.

Mr. Skarda: Mr. Napier, we would like also to incorporate a stipulation about the gross value of items, the bread delivered to Farwell broken down by months. It goes to '49, to April '49.

Mr. Napier: Go ahead and ask if that is right, and tear it out and introduce it in evidence, if you like.

The Court: Let me tell the Jury what this is.

Members of the Jury, it has been agreed by counsel, and you may consider it as evidence in the case, that the defendants operated on a regular schedule a bread route from Clovis, New Mexico, a delivery, from September 18, 1946, until January 16, 1948. At that time it was discontinued. And began again on December 27, 1948, and continued until the latter part of 1951. That agreement you may consider as evidence in the case.

(Off the record.)

The Court: Did I tell you from Clovis to Farwell?

A Juror: No, sir.

The Court: All right.

276 Q. Mr. Mead, I believe you just testified that the stockholders of the Mead's Fine Bread Company in Clovis were yourself, Billy O. Mead, and E. E. Corcoran.—A. That's right.

Q. And except for A. K. Miller the stockholders are the same as for the Mead Service Company. Is that correct?—A. That would be correct.

Q. What is the capital stock of the Mead's Fine Bread Company?—A. The capital stock of Mead's Fine Bread Company of Clovis is authorized at \$20,000.

Q. What is the book value of your plant in Clovis? What was it?—A. Mr. Blythe, I furnished that figure in my deposition. I can't recall the exact figure.

Q. In your deposition taken May 27, 1949, I ask you whether or not you gave that figure as \$59,965.10?—A. Well, I don't—.

The Court: Show him the deposition.

A. I don't know, Mr. Blythe. It is typed in on the only one I ever saw. Do you have another copy?

Q. Is that a copy of the deposition to which you refer?—

A. Yes, that is it.

Q. The figure is typed in there as \$59,965.10.—A. That is the figure that I supplied.

Q. Was it correct at that time?—A. Yes, sir.

277 Q. Is it still correct? Or would there be any difference now?

Mr. Napier; May I have a conference with counsel and approach the bench, please, sir?

(Off the record.)

The Court: Proceed.

Q. Who were the incorporators of Mead's Fine Bread Company of Chaves County?—A. The incorporators were myself and Billy O. Mead and Mr. E. E. Corcoran.

Q. Who are the stockholders?—A. The stockholders are myself, Mr. Alexander K. Miller, and Billy O. Mead, and E. E. Corcoran, and W. L. Mead.

Q. And what is the capitalization of that company?—A. The authorized capital stock was \$17,000.

Q. There are several other bakeries in this part of the country known as Mead's bakeries, aren't there?—A. This part of the country meant where we were talking then, is that correct?

Q. I am asking you now. I will say in New Mexico and west Texas?—A. Yes, sir.

Q. There is one here in Albuquerque, isn't there?—

A. Yes, sir.

278 Q. Do you have any interest in that one?—A. No interest of any kind.

Q. Who operates that bakery?—A. I understand it belongs to Edward Mead.

Q. Doesn't belong to any member of the Mead family?—

A. I said it belonged to Edward Mead, Mr. Edward Mead.

Q. What relation is he to you?—A. He is a cousin of mine.

Q. There is one in El Paso, isn't there, also?—A. Yes, sir. That belongs to him also.

Q. Where else are there bakeries known as Mead's bakeries?—A. Well, there is one in Amarillo, Texas, and one in Wichita *Fallas*, Texas; one in San Angelo, Texas, and one in Abilene, Texas, and one in Big Spring, Texas.

Q. One in Oklahoma, too?—A. Yes, there is one in Lawton, Oklahoma.

Q. All owned by members of the Mead family, is that right?—A. The ones I mentioned in Texas and Oklahoma, as far as I know, belong to an uncle of mine.

Q. Do any of the stockholders in the Mead's Fine Bread Company of Clovis and the Mead Service Company and the Mead's Fine Bread Company of Lubbock and the Mead's Fine Bread Company of Chaves County, do each—do any of those stockholders hold an interest in these other corporations you have just named?—A. No, sir, none whatever.

Q. Don't you or Billy O. Mead own some stock in the bakery at Big Spring?—A. No, sir. We did at that time, but the bakery at Big Spring was sold some years ago. We don't own anything now.

Q. Now, who is W. L. Mead?—A. W. L. Mead is my father.

Q. And he owns the bakery in Big Spring, does he?—A. No. He did several years ago. He sold it.

Q. What are his baking interests at the present time? What firm is he interested in?—A. Just in the ones you have named.

Q. Doesn't W. L. Mead own some stock in some of these other corporations?—A. Which one of the others, Mr. Blythe?

Q. Well, let's just go down the list. Does he own any stock in the Mead's Fine Bread Company of Clovis?—A. Yes, sir.

Q. Mead Service Company?—A. Yes, sir.

Q. The Mead's Fine Bread Company of Chaves County?—A. I have testified on each of those he was a stockholder.

Q. And the Mead's Fine Bread Company of Lubbock?—A. Yes, sir.

Q. And still a stockholder in the Big Spring bakery, or has he sold his interest?—A. He sold all his interest, all of it.

Q. Is he interested in the Meads bakery at Albuquerque?

—A. No, sir.

Q. Or the one in El Paso?—A. No, sir.

Q. Or the one in Hobbs?—A. Well, indirectly, yes. There wasn't one at Hobbs at the time we are talking about here.

Q. Well, does he have an interest in it now?—A. Yes, he does now.

Q. Do you know when he acquired that interest?—A. Yes.

Q. When was it?—A. He acquired the interest about—around the first day of June, 1949. Sometime during the month of June.

Q. What interest, if any, do you have in the Hobbs plant?

—A. I acquired an interest in the Hobbs plant—I believe it was July, 1949.

Q. Who are the other stockholders in that corporation?—

A. Well, the Hobbs corporation was—it was purchased in 1950 by our Lubbock corporation. It was dissolved in 1950—rather, it was dissolved in '50 and purchased in '49.

Q. No separate corporation at Hobbs?—A. No,
281 sir.

Q. It is merged with the Lubbock corporation?—A. Yes, sir.

Q. Any other corporation merged with the Lubbock corporation?

Mr. Napier: We object to any question in that regard, Your Honor, unless he fixes the time.

The Court: That occurred after any of these transactions, didn't it?

Mr. Napier: Yes, sir.

The Court: No use in going into that, Mr. Blythe. Ownership at the time of the controversy.

Q. Now, these bakeries we have been talking about, Mr. Mead, market a product called "Mead's Fine Bread", do they not?—A. Yes, sir. I know ours did.

Q. What?—A. I said, I know ours did. Our Clovis plant did.

Q. They all used substantially the same bread wrappers,

did they not?—A. I suppose you might say substantially the same. They are yellow covers.

Q. Where did you buy your bread wrappers; or where did you at the time involved here?—A. Oh, the bread wrappers were bought from several paper mills. Holland Paper Mill at Kalamazoo, the Vegetable Parchment Company.

282 Q. You got a better price by all using the same wrapper?—A. We didn't use exactly the same wrapper.

Q. But on those you did use in common, you got a better price by all using them?—A. Might have been.

Q. I am not asking what might have been. Do you have any knowledge of your own on that subject?—A. Well, usually the bakery in Lubbock used enough of most any kind of wrapper to get a maximum price.

Q. You mean get their maximum discount?—A. Yes.

Q. What about the Mead's Fine Bread Company of Clovis? Did they use enough wrappers to get the maximum discount?—A. I just don't know, Mr. Blythe.

Q. You are secretary-treasurer of the Mead's Fine Bread Company of Clovis?—A. Yes, sir.

Q. You write the checks?—A. No, sir.

Q. Who does write the checks?—A. The checks are written in Clovis by the bookkeeper and plant manager, who sign the checks.

Q. But as treasurer you would be aware of the disbursements?—A. Yes, sir, indirectly.

283 Q. You go over them once in a while, don't you?

Would that be indirectly?—A. Yes, sir, I think so. They are already made out when I go over them.

Q. You advertise Mead's Fine Bread companies rather extensively in west Texas and New Mexico, do you not?—A. Mead's Fine Bread.

Q. What means of advertising do you use?—A. At that time we were using radio advertising, and I think some motion picture screen advertising, some outdoor billboard advertising, some newspaper advertising.

Q. Was that advertising program conducted out of the Lubbock office?—A. No, sir, it was conducted through each plant.

Q. The advertising copy was usually gotten up in Lubbock, though, by your Lubbock corporation? Wasn't it?—A.

The advertising copy generally at that time was furnished by an advertising agency that handled the advertising for the Clovis plant.

Q. Wasn't it true that the cost of preparing mats and other forms of advertising was usually charged up to the Lubbock corporation even though it was going to be used for the others?—A. I think not. The Clovis plant was billed by the advertising agency.

284 Q. But they just billed, though, for the space they used, and the time it might be, and not for the service of preparing the copy?—A. I don't know, Mr. Blythe.

Q. You were present when we took the deposition of Rex Webster, your advertising man, were you not?—A. No, sir, I don't think I was.

Q. If he said the cost was usually borne by the Lubbock corporation, would he be right or wrong?—A. Well, if he said it, he must have been right. He was the advertising agency man.

Q. Is he still your advertising director?—A. At this present day?

Q. Yes.—A. He handles a great deal of our advertising, yes, sir.

Q. What officer of the corporation handles advertising?—A. As well as I remember at this time I think Billy O. Mead handled advertising for the Clovis plant and through that agency.

Q. Who did it in Roswell?—A. As well as I remember our Mr. Miller did there.

Q. Who did it in Lubbock?—A. Bill, Billy Mead.

Q. You have already testified you used billboard space.—A. I think so. I think that is what I testified. We had some.

285 Q. Your billboard advertisements usually just show a loaf of bread, and have some slogan like "Mead's Fine Bread is fresherized."—A. At that time I think we had a number of boards. Some throughout New Mexico, I think, just had a loaf of bread with "Mead's Fine Bread" on it.

Q. Without the name of the bakery, is that right?—A. I don't remember.

Q. You still have some of those signs up, do you not?—A.

I think I saw one over by Clovis the other day; driving and saw one.

Q. How is the cost of that billboard advertising apportioned among the four corporations?—A. Mr. Blythe, as well as I remember those billboards we are talking about over at Clovis, those were—all belonged to the Clovis plant. They were leased or rented on some basis like that as well as I remember.

Q. Well, since there was no advertising of any particular bakery on these sign boards, wouldn't a bakery using the same name and manufacturing the same product get some benefit out of it even though the sign board wasn't in their own territory?—A. I don't know, Mr. Blythe. We are in the wholesale business. All we have ever thought about is advertising our product and not our plant where it is baked at. That has been our foremost thought all the time.
286 Advertise what we are going to sell and not the place we made it.

Q. Actually, you are operating as one business, aren't you?—A. No, I didn't say that.

Q. Well, you are pushing your product all over the whole area without trying to push any particular bakery, is that right?—A. No, I wouldn't say that.

Q. Well, what do you say?—A. What I said was that the principal thing that the Clovis bakery was interested in was selling our loaf of bread. That is what we are in business for; to sell bread there.

Q. But the territory in which the Clovis bakery operated is adjacent to the territory covered by your Lubbock corporation, isn't it, on the one side?—A. Yes, sir, it happens to be that way.

Q. And the Roswell bakery comes up to them on the south, is that right?—A. The way those towns are located, I guess that is the way it is.

Q. So that a billboard advertisement that happened to be, let's say, at Portales might very well benefit Roswell as well as the Clovis bakery, mightn't it?—A. In Portales?

Q. I am not saying, you understand, you do have a billboard in Portales. If you did it would benefit the Roswell corporation as much as it would Clovis perhaps;
287 have that tendency?—A. I don't know. If it sold the

bread, it might. The main thing we are interested in is selling that loaf of bread right there where the people sell it.

Q. What company handled your advertising at the time involved here?—A. It was Buckner, Craig, & Webster Advertising Agency.

Q. Where are they located?—A. Lubbock, Texas.

Q. Do you know what territory they cover?—A. Oh, they handle advertising for a number of companies and a number of manufacturers. I don't know just how wide the territory would be.

Q. They operate in New Mexico as well as in Texas, do they not?—A. Yes, sir.

Q. They placed your advertising with various advertising media in both states, did they not?—A. No, I don't think they place anything Clovis had anywhere, but someplace there in Clovis.

Q. If Mr. Webster testified they did, would he be right or wrong?—A. I didn't hear Mr. Webster's testimony. That is just what I thought about.

288 Q. Now, when *you* deposition was taken on May 27, 1949, you agreed to supply some figures as to the average number of loaves of bread produced each month prior to July, 1948, by the Clovis bakery. Do you have a recollection now as to what that figure was?—A. No, sir, I couldn't say without—I couldn't say the exact figure. I remember obtaining the information and giving it to you.

Q. I hand you here the original of your deposition, and call your attention to line 11 on page 13. —A. Prior to July, 1948?

Q. Yes. And ask you to read the figure you find there.—

A. The average number of loaves of bread produced each month prior to July '48, 154,821 lbs.

Q. Do you know whether that figure was correct or not?—

A. I furnished the figure. It is correct.

Q. Then the following question is the same figure for July, 1948, to April, 1949. That is, the average number of loaves produced each month. What is that figure?

Mr. Napier: If it please the Court, we have no objection to the introduction of that information, but I can't see the materiality of that particular phase of testimony.

The Court: What is the purpose?

Mr. Blythe: Well, if the Court please, the defendants have counter-claimed for their loss of profits, too.

289 The Court: You are anticipating something now. I suggest you wait and put that on in your evidence regarding that after the defendants have counter-claimed.

Mr. Blythe: Very well, sir.

Q. Now, with respect to the bread sales in the town of Farwell, Texas. You supplied certain figures in your deposition of May 27, 1949, regarding that. I hand you here your deposition and call your attention to the figures on September 14th and ask you if they are correct?

Mr. Napier: May I see that, Mr. Blythe? We have no objection to that. That is correct.

A. Mr. Blythe, which period of time now? I supplied these figures for a number of months here.

Q. I am asking about all those figures on that sheet of paper. What they are.—A. Yes, the dollar and cent figures are correct. There is a lot of dates there, though.

Q. Well, you supplied both dates and figures, did you not?—A. Yes, sir.

Q. Were they as correct as you could get them at that time?—A. Yes, sir, they were.

Q. Were they correct?—A. Yes, sir.

Q. Are they still correct then?—A. Yes, sir, with
290 the purpose they were given for and the way they appear here, as nearly correct as I could have it done.

Q. Now, these figures we have been discussing are now identified as Plaintiff's Exhibit 2, are they not?—A. That's right.

Mr. Blythe: I tender Plaintiff's Exhibit 2 in evidence.

The Court: No objection?

Mr. Napier: No, sir.

The Court: Admitted.

Q. Mr. Mead, would you be in a position to bring those figures any further down to date, now?—A. No.

The Court: You ought to either read that to the Jury or

hand it to them. To offer a matter of that kind in evidence, if the Jury doesn't see it, doesn't do any good.

Q. It has already been stipulated, I believe, that these trips by your bread truck from Clovis to Farwell were made on regular schedule. Would you say what that schedule was and how often that bread truck went over there?—A. I really don't know, Mr. Blythe. That was sometime ago. I don't feel qualified to say just what the schedule was.

Q. You wouldn't know whether daily or every other day or how often?—A. No, I wouldn't know.

291 Q. But they did regularly service their clients or patrons and customers over there, is that right?—A. Whatever "regular" was.

Q. What was your answer?—A. I said whatever "regular" was. For a certain period of time there.

The Court: Maybe I am getting tired, but I just didn't understand that last answer. What did you say?

Mr. Blythe: He said, whatever "regular" was.

A. I said whatever he meant by regular deliveries, yes. I said I didn't feel qualified to say whether they were daily or every other day or twice a week.

The Court: All right.

A. I said they were for a certain time there; whatever that time was.

The Court: And he said "regular", and you said, whatever "regular" was?

A. Yes, sir. Whatever he meant by "regular."

The Court: All right, proceed. Keep order. I think I was getting sleepy.

Q. Well, they were taking care of their customers over there, I assume, weren't they?—A. You assume, you say?

Q. I said, they were taking care of their customers.
292 —A. Yes, sir.

Q. Whatever "regular" it took, that is what they did?—A. Yes, sir.

Q. Do you know when the Mead's Fine Bread Company

took over operation of the Clovis bakery?—A. Yes, sir, it was in 1946. I think the date was August 19, 1946.

Q. You bought the bakery from whom?—A. The bakery was purchased from a Mr. Sam Sun, S-U-N.

Q. Before that did you truck bread in there from Lubbock?—A. Yes, sir, the Lubbock bakery had I believe two regular routes running into Clovis that year; part of that year.

Q. At various times after you started up the bakery in Clovis you also trucked bread in there due to breakdowns of the Clovis plant, did you not?—A. I think I can recall two times is all. There was a breakdown or shutdown. It was during an emergency period for one day, a day and a half.

Q. This bakery in Clovis is supervised from Lubbock, isn't it?—A. No, sir.

Q. You make frequent trips over there, do you not?—A. Occasionally, yes, sir.

Q. How often is "occasionally?"—A. Well, at that time occasionally was more often than it probably would
293 be right now.

Q. Well, you didn't answer my question, Mr. Mead. I said how often was the occasion at that time?—A. Oh, Mr. Blythe, as well as I remember I would say about once every two and a half or three weeks, I was there.

Q. You are speaking of your own trips?—A. Yes, sir.

Q. What about Billy Mead? Did he make trips over there frequently?—A. I would say he made the trip about as frequently as I did.

Q. What about Ed. Corcoran?—A. He was possibly over there a little more often.

Q. How often was Mr. Corcoran over there during the period in question?—A. Mr. Blythe, I couldn't say any more definitely than probably more often than I was. I just wouldn't know.

Q. He more or less supervised the Clovis plant? Mr. Corcoran, I mean.—A. The sales part, yes, sir, especially.

Q. He was the one that ordered the price cutting in Santa Rosa?—A. That is what I understand.

Q. Did he consult you before he did it?—A. No, I wasn't consulted.

294 Q. Do you know whether he went over there on the

day the price cutting started?—A. Well, he had to be there if he was the one that cut the price. He had to be there.

Q. Now, did he ever ask the board of directors to ratify this act of his?—A. No, sir. You are referring to the actual—

Q. The price cutting.—A. No, sir, he didn't.

Q. What was that?—A. I said he didn't.

Q. It met with your approval, though, did it not?—A. Well, that was within his regular line of duty.

Q. Who made the decision to discontinue the price-cutting?—A. I couldn't say for sure, Mr. Blythe, whether it was Billy O. Mead and Mr. Corcoran together or—

Q. You didn't have a board of director's meeting?—A. No, sir. That was within their regular duties in the field of operations and sales.

Q. Wasn't the decision reached over in Lubbock?—A. I don't know where it was, Mr. Blythe.

Q. Now, the route that serviced Santa Rosa also went to Las Vegas, New Mexico, didn't it?—A. As well as I remember, it did, yes, sir.

Q. So that if you sold a loaf of bread in Santa Rosa
295 or not your truck would still pass through there, wouldn't it?—A. Well, I don't know what you mean by pass through. The truck lived there, at this particular time.

Q. Well, your truck went from Clovis to Tucumcari first, didn't it? Wasn't that its regular route?—A. I am not sure which way the truck went. It went to Tucumcari or it went to Fort Sumner one. It is about the same distance I imagine.

Q. Regardless of whether it was going from Tucumcari to Las Vegas or from Fort Sumner to Las Vegas, the closest route is through Santa Rosa, isn't it?—A. I suppose it would be.

Q. Do you know how much of an increase there was in your bread sales in Santa Rosa after you started cutting prices? That is from September 3, 1948, until April 26, 1949?—A. I don't know whether I furnished you any figures on that or not when I testified.

Q. Well, do you have any knowledge of approximately how much they increased?—A. No, I wouldn't be able to say for sure until I could see the figures that I have submitted.

Q. You have no independent recollection at the present time?—A. No, I don't, Mr. Blythe.

Q. They did increase, though, didn't they?—A. I
296 don't remember any of them, now. I am thinking I gave you some figures, probably.

Q. I am asking what your knowledge is now, Mr. Mead.—
A. I just don't know, Mr. Blythe. I really don't know.

Q. Don't know whether they increased or not, much less the amount?—A. No, sir. If I submitted figures to you, they were mine and they would be correct.

Q. Do you know what the wholesale price of bread was in Santa Rosa, New Mexico, on September 2, 1948?—A. Well, the wholesale price on the one-pound bread was 14 cents on or about September, 1948.

Q. And for the pound-and-a-half loaf, how much was it?—A. There has been a great deal of time elapse, and I don't know exactly just what the price was.

Q. You heard testimony here today it was 21 cents a pound. Do you know whether that was right or wrong?—A. Fourteen and twenty-one. I believe that is correct, Mr. Blythe. It is either 20 or 21. Like I say, it has been a long time.

Q. Do you know the price to which it was cut by Mead's on September 3, 1948, in Santa Rosa?

Mr. Napier: I believe it is all stipulated.

A. I think so.

297 The Court: I believe that is correct. It has been agreed to, hasn't it?

Mr. Blythe: Very well.

Q. Now, this suit was filed during the period of the price-cutting, wasn't it?—A. As well as I remember it was along in March of 1949.

Q. That would be approximately six months after the price cutting started, wouldn't it? Possibly in the seventh month?—A. Six months or so.

Q. And then on April 26, 1949, the price cutting stopped, is that right?—A. That is supposed to be the correct date.

Q. Did the filing of this suit have anything to do with your decision to raise prices back to the place they were before the price cutting started?—A. Mr. Blythe, maybe I am

getting sleepy, too. The only way I could answer that for myself is that I don't know.

Q. You had nothing to do with the decision?

Mr. Standley: Your Honor, I can't hear the witness.

The Court: The only way you could answer is for yourself, and you didn't know?—A. Yes, sir. I am sorry, excuse me.

Q. And then you had nothing to do with the decision to restore the price, is that right?—A. I am quite sure
298 that is the way I testified just a few minutes ago, that I didn't.

Q. Even though you are an officer and director of the corporation, you were not consulted?—A. I believe I testified a moment ago—I will say it again. I am not sure, I don't know whether Mr. Corcoran in the regular line of his duty did do it or whether Mr. Corcoran and Billy O. Mead together, I said I didn't know.

The Court: Do you have any more questions of this witness?

Mr. Blythe: If the Court please, I beg your indulgence. I am trying to eliminate a lot of material that was covered before.

Q. Mr. Mead, do you have any knowledge of whether or not the—strike that.

Mr. Blythe: I believe that is all.

The Court: Do you have questions at this time, Mr. Napier? Or Mr. Houk?

Mr. Napier: We have some questions on what Mr. Blythe has asked, and we will wait and recall the witness if the Court desires. We can go into those things now.

The Court: You may go. Call your next witness.

299 Mr. Standley: Your Honor, at this time, we would like to introduce the oral deposition of Rex Webster taken September 16, 1949, in Lubbock, Texas.

I think we will introduce the whole thing, Mr. Napier. It is very short.

REX WEBSTER after being duly sworn, testified as follows:

Direct Examination by Mr. Blythe.

Q. State your name.—A. Rex Webster.

Q. Are you with the firm of Buckner-Craig & Webster?—

A. Yes, Buckner-Craig & Webster Advertising Agency.

Q. What is your position with that firm?—A. I am a partner in the firm.

Q. Do you have your headquarters here in Lubbock?—

A. We do.

Q. In your business, do you have as a client various Mead Bakery corporations in this area?—A. We have as clients Mead's Fine Bread Company of Lubbock, Clovis, and of Chaves County and Roswell.

Q. Do you also have as a client Mead Service Company?

—A. I didn't know there was such a company existing. We work through the individual corporations.

Q. Do you represent the Mead bakeries in Albuquerque?—A. No, sir, we do not.

Q. El Paso?—A. No, sir.

Q. Hobbs?—A. Hobbs, recently, the last three months.

Q. Big Spring, Texas?—A. We are working through Mr. E. P. Mead at Big Spring.

Q. Amarillo?—A. No, sir.

Q. I believe there are two Mead bakeries in Oklahoma, too, one at Lawton and one at Oklahoma City. Do you represent any of them?—A. No, sir, we do not.

Q. Do you have written contracts with these various companies?—A. No, sir, we do not.

301 Q. What are the general terms of your oral arrangement with them?—A. We are to handle and place all advertising through the direction of the officers of the separate corporations.

Q. What mediums do you place this advertising in?—A. Radio, newspapers, bill boards, circulars, motion pictures, and point of display merchandise.

Q. What is that point of display?—A. That would be placards put nearby a bread rack or that type of thing.

Q. Now, do you draw up the copy for these advertisements?—A. Yes, sir, we do.

Q. Do you have mats prepared for some of them?—A. On some of them. Those ads which require art work from our Art Department, we prepare the art work and have the engravings made and then have the mats made. That is the process.

Q. Do you distribute those mats?—A. We distribute those mats whenever we have authority to place the advertising.

Q. Who determines what publications, in the case of newspapers, for instance, what publications will be used and when ads will be put in them?—A. We recommend what medium and what newspapers, for example, shall be used and our recommendations are either accepted or refused.

302 Q. Do you send the advertising direct to the newspapers?—A. In most cases we do.

Q. Do you have written authorization in each instance for that?—A. No, sir, we have the verbal agreement.

Q. Well, now, if you were going to place an ad in the Clovis News Journal, for instance.—A. Yes, sir.

Q. I mean do you recommend that it be placed in that paper?—A. Yes, sir, that is right.

Q. To whom do you recommend it?—A. Probably to either Mr. Bill or Mr. Mack Mead.

Q. That is true for each advertisement, is it?—A. Yes, sir, unless a prearranged campaign has been agreed upon to use a certain medium, in which case individual authorization for a particular type of space is not required.

Q. With regard to these other corporations in this group that you have said that you represented.—A. Yes, sir.

Q. —from whom do you receive your verbal authorization to place advertising?—A. From Lubbock we receive the authorization of Mr. Bill Mead generally. However, Mr. Mack Mead or Mr. Ed Corcoran can give authorization. In

303 Clovis, generally the same situation exists. In Roswell, Mr. Alex Miller gives us the authority to place all our advertising.

Q. Excuse me. Is he the same as A. K. Miller?—A. Yes, sir, he is the same, I presume.

Q. Go ahead with the others.—A. Let's see. The recent account, Mead's Baking Company in Hobbs, we checked with

Mr. Bill Mead or recent advertising. Mr. W. L. Mead was consulted until a month ago.

Q. The bakery changed hands about that time, did it not?

—A. I don't remember the exact dates but I suppose possibly four, five, or six months ago Mr. W. L. Mead made an exchange of the Big Spring plant to Mr. E. P. Mead and Mr. W. L. Mead then was supervising the activities of the Mead Baking Company in Hobbs and we received authority to place any advertising from him. Do you want me to go into this Big Spring deal?

Q. Yes.—A. When the Big Spring plant changed hands and Mr. E. P. Mead took over the active managership, we received authority from him to place advertising in the Big Spring area.

Q. Could you supply a tabulation of the amounts of money spent for advertising by these various corporations and companies you have mentioned since January 1, 1946?—

A. Yes, I can.

Q. Broken down by the medium employed?—A. Yes, we can do that.

304 (The document so compiled was received in evidence as Plaintiff's Exhibit No. 1.)

Mr. Standley: Well, we won't read that.

Q. Now, isn't most of this advertising that you place what might be called an institutional type of advertising?—A. Generally I would say it was not. Most of it is a direct selling job and not an institutional—in our category putting a mat of a local bread in an ad without any selling copy would be institutional advertising. If you put that mat of the local bread in the newspaper, for example, and have some strong selling copy, we do not call that institutional advertising.

Q. Well, don't you try to put over certain slogans, particularly the name "Mead's Fine Bread," in all of the areas in which you place advertising?—A. Yes, sir.

Q. Now, in most cases, aren't these advertisements identical regardless of where they are placed?—A. No, sir, they are not. We prepare specific ads for the different territories. In some cases we have had the same ads in each territory, because we want to make the advertising as effective as possible and we can do it easier that way.

Q. Isn't it true that very seldom is the name of any specific bakery mentioned in this advertising?—A. That is true.

305 Q. I mean you are just trying to sell Mead's bread regardless of where it is made?—A. Yes, we are not trying to sell the bakery. We are trying to sell Mead's Fine Bread, yes.

Q. And if you place a newspaper advertisement here in Lubbock in any newspaper, you would not say that this bread is made in Lubbock and appeal to the local pride that way?—

A. Some ads are prepared as you mention. But we have had a number of instances where we specifically pointed out the local angle; for instance, by calling attention to the fact that the oven in which Mead's Fine Bread is baked in Lubbock is the largest between Fort Worth and Phoenix, Arizona.

Mr. Standley: Then you introduced tear sheets from various newspapers.

Q. (By Mr. Blythe) I hand you herewith Plaintiff's Exhibit No. 2, which is a tear sheet from the Albuquerque Journal, dated July 26, 1949, and call your attention to an advertisement at the left-hand lower corner of page 13 thereof and ask you if you know anything about it?—A. No, sir, that is not our work.

Q. It is an advertisement of Mead's Fine Bread, is it not?—A. It is.

Q. Isn't it very similar to ones you do prepare?—A. No, sir.

306 Q. I hand you herewith Plaintiff's Exhibit No. 3, which is a tear sheet from the Clovis News-Journal of May 30, 1949, and call your attention to an advertisement on the righthand lower side of page 8 thereof. Did your firm have anything to do with that advertisement?—A. Yes, sir, we prepared this.

Q. That ad does not make any reference to any particular bakery or corporation, does it?—A. No, sir, it does not.

Q. I will ask you if that isn't more or less typical of your advertising in that respect?—A. That was one campaign which was used throughout the territory for the different corporations.

Q. That was when they introduced a new product, wasn't it?—A. Yes, sir.

Q. Is that product called Mead's Fine Buttermilk Bread?

—A. Yes, sir.

Q. That product was introduced simultaneously all over the area?—A. No, sir, it was introduced in Lubbock first and then was introduced in the other areas, I think a week or so apart.

Q. With you it was all part of the coordinated advertising campaign?—A. Yes, sir, we tried to coordinate the campaign to make it more effective.

Q. Now, I hand you here Plaintiff's Exhibit No. 4,
307 which is a tear sheet from the Amarillo Times of September 15, 1949, and call your attention to an advertisement of Mead's Fine Bread on page 5, Food Section B, thereof, and ask if your firm had anything to do with that advertisement?—A. No, sir, we did not.

Q. It is again somewhat similar to yours, is it not?—A. No, sir.

Q. What is the difference?—A. It is prepared in a different style and that is what we would call institutional advertising, and we never use that type of advertising for the separate corporations that we represent.

Q. I hand you herewith Plaintiff's Exhibit No. 5, which is a tear sheet from the Amarillo Daily News of September 15, 1949, and call your attention to an advertisement of Mead's Fine Bread appearing on page 20 thereof and ask whether your firm had anything to do with that advertisement?—A. No, sir, we did not.

Q. Do you know what advertising firm does handle the account of the Amarillo Mead's bakery?—A. No, sir, I understand that the mats which are run there are prepared in Albuquerque. That is all I do know and that is hearsay. I don't know whether they are or not.

Q. The Mead's Fine Bread companies in this area have also done certain types of advertising that might be
308 termed stunts, have they not, like using amplifiers from airplanes and using girls dressed in gingham costumes to distribute this buttermilk bread and various stunts like that?—A. We used some of those. Some of them have not been authorized by us, but were used at the discretion of the individual corporation.

Q. Well, will the data that is requested under Exhibit 1

of this deposition include money spent for such advertising as that?—A. No, sir, it will not.

Q. Do you have any records of that type of advertising?

—A. No, sir. It was handled through the individual companies and we supervise the advertising and work up the idea, and the individual companies then took it upon themselves to hire the girls, for instance, in this buttermilk girl campaign and this amplifier in the airplane was arranged individually. Our agency had nothing to do whatsoever with that campaign.

Q. Then these companies do spend money for advertising besides what they spend through your—A. Some, yes, sir. I am always informed but some individual stunts, as you call them, are handled separately outside of our agency.

Q. Do they ever place newspaper advertising otherwise than through your agency?—A. Not that I know of.

Q. Your *notion* picture advertisements are prepared
309 where?—A. Our motion picture advertisements are prepared through the Alexander Film Company Colorado Springs.

Q. Do you pay them for their work or is that handled directly by these corporations?—A. We pay all bills incurred by the individual companies for film advertising.

Q. In other words, you pay the cost of producing the film as well as the charge of the theaters for exhibiting?—A. Yes, sir.

Q. Could you supply a list of the newspapers and radio stations with which your company has placed advertising for these various corporations in the period covered by Exhibit No. 1?—A. Yes, sir, I will be glad to include that in Exhibit 1, in the breakdown.

Q. Very well. Now, what overall instructions have you had from these various corporations regarding the type of advertising they wish to do?—A. We consult with the officers and are given a budget and we recommend the advertising program that should be used for each individual corporation.

Q. In what respect have these advertising programs for the various corporations varied from each other?—A. If
310 there is a particular event in Lubbock that we wish to tie Mead's Fine Bread with, we prepare a special ad

to create that effect. The same thing applies in Clovis and Roswell.

Q. But other *that* for these special events, is the advertising substantially the same in all of the areas served by this corporation?—A. Yes, sir, that is the purpose of our advertising agency, is to coordinate as much as possible the advertising of Mead's Fine Bread.

Q. Are you paid individually by these various corporations?—A. Yes, we are.

Q. Would you attach as Exhibit No. 6 samples of advertising that have appeared in newspapers in all of the areas concerned?—A. Yes, sir, we can supply most of that.

Q. Well, just two or three samples.—A. Yes, sir, we can provide that. I would be reluctant to say we could supply all of it, because some of the tear sheets might not be available in our office now.

Mr. Blythe: I believe that is all.

Mr. Standley: You want to read your end of it?

Mr. Napier: May I have just a moment, Your Honor?

Cross-Examination by Mr. Napier.

Q. Your business is selling advertising?—A. Yes, sir; placing advertising, more exactly.

Q. Clovis and Roswell and Lubbock, the companies
311 that we are talking about, are not your only clients, are they?—A. No, sir, they are not.

Q. They just form a small part of your business?—A. That is correct.

Q. Give us some idea of what percentage of your business they form.—A. Through the last year I think the entire billing of the separate corporations of Mead's Fine Bread Company represented about twenty-five per cent of our total gross volume.

Q. Who are some of the other clients?—A. Standard Milling Company of Lubbock, Welderz Frend Generator Company of Lubbock, Steel-Bilt Products Company of Lubbock, Lubbock Building Products of Lubbock, Piggly-Wiggly of Lubbock, Morrison Construction Company, Austin, Deaton & Son Construction Company, Odessa, Empire Machinery Company, Odessa, Hannock-Wommaek Manufacturing Com-

pany of Lubbock, Harvest Queen Mills of Plainvies, The Rowland Company, Plainview, and Clover Lake Dairies of Plainview and Lubbock and there are approximately twenty other small accounts that we handle.

Mr. Napier: Let me see. I may want to introduce the rest of this. That is all I care to introduce of this.

The Court: Anything more in this deposition?

Mr. Stanley: Redirect examination, Your Honor.

The Court: Proceed.

312 Mr. Standley: I will confine that from the question on line 9 on down, if it is all right?

Mr. Napier: Let me see.

Mr. Standley: Well I will read all of it.

Redirect Examination by Mr. Blythe.

Q. Just one more question, Mr. Webster. How do you apportion among the various corporations involved in this immediate setup the cost of preparing a mat which is going to be used in advertising for all of them?—A. The general policy is to bill it to the company for which it is used first.

Q. Are these advertisements that are intended for such circulation as that submitted to all of the corporations in advance for their approval?—A. Yes, sir.

Q. But they do not split the cost of it but the one that uses it first pays all of it?—A. Generally that is the way it is provided for.

Q. Is there any one of them that generally uses it first?—A. Generally Lubbock does, yes, sir, because it is the focal point, at least so far as we are concerned.

Q. So they usually pay the cost of the art work and these other corporations pay only the cost of the mats that are distributed to them, or what do they pay?—A. They pay the space or time charges; then we receive the commission from the newspaper or radio station.

313 Q. Then these other corporations don't pay any of the cost of preparation of these ads; is that right? Only the Mead's Fine Bread Company of Lubbock pays that?

—A. They perhaps would pay for the mat charge, but most

of the payment is made by the company originating the advertising or inaugurating the advertising campaign.

Mr. Blythe: That is all.

Mr. Napier: That is all.

The Court: Call your next witness.

Mr. Standley: If the Court please, the plaintiff offers in evidence the deposition of Rex Webster with the exceptions noted and including the exhibits thereto.

The Court: Admitted, including the cross-examination. Call your next witness.

Mr. Standley: Just a second, Your Honor.

The Court: Let's proceed, gentlemen.

Mr. Standley: We have another deposition, Your Honor.
(Off the record.)

314 LEHN ENGLEHART, having been first duly sworn, testified as follows:

Direct Examination by Mr. Blythe.

Q. State your name?—A. Lehn Englehart.

Q. Where do you live, Mr. Englehart?—A. In Albuquerque.

Q. What business are you in?—A. I am a partner in a bakery in Farmington at the present time.

Q. Have you ever been in the baking business elsewhere in New Mexico?—A. Here in Albuquerque, yes, sir.

Q. How many years in the baking business here in Albuquerque?—A. I was associated with my dad since 1917 and in 1934 I bought my dad out and I operated that bakery until 1948 and then I sold it.

Q. Did you immediately go up to Farmington and establish a bakery there?—A. No, it was about three months.

Q. Except for that three months then you have been constantly in the baking business since 1917?—A. I have.

Q. What type baking business have you been in?—A. In the bread business.

315 Q. Manufacturing bread for sale at wholesale?—
—A. Yes, sir.

Q. Any retail business?—A. At the present time in Farmington we have some retail business.

Q. Has most of your experience been in retail or wholesale—A. In wholesale.

Q. What is the name of the bakery you operated here in Albuquerque?—A. Englehart Baking Company.

Q. What territory did that bakery cover? Did you sell bread outside of Albuquerque?—A. Yes, sir, we did.

Q. Over what area?—A. Oh, from here to Gallup and Santa Fe and as far south as Socorro.

Q. Did you ever sell bread in the Santa Rosa Neighborhood?—A. We did years ago, I would say 15 years ago we had some shippers, customers we shipped over there by truck.

Q. Did you ever sell bread in Las Vegas?—A. Yes, sir.

Q. Have you been in and around Santa Rosa very much?—A. Not very much, not in recent years.

Q. Have you ever been in the bakery that L. L. Moore formerly operated in Santa Rosa, New Mexico?—A. Yes, sir, I have.

316 Q. Approximately, when was that?—A. I believe it was in the summer of 1949 or 1950. I am rather vague on that.

Q. Did you have an opportunity on that occasion to look over his plant?—A. I did.

Q. Will you describe that plant to the jury?—A. Well, it seemed like a nice little operation to me. He had practically all new equipment in there at the time. His bakery was very clean and looked like a stream lined operation that could produce quite a bit of stuff at a profit.

Mr. Napier: I believe that is a voluntary statement on the part of this witness, Your Honor, and we ask that the jury be instructed not to consider the statement.

The Court: I don't think it was responsive to the question.

Mr. Napier: It isn't proper.

The Court: But counsel now examining can adopt it if he desires.

Mr. Blythe: We adopt it, Your Honor.

The Court: Proceed.

Q. Have you ever had an opportunity to observe the product Mr. Moore's Bakery put out.—A. I did. In fact, Mr. Moore's brother gave me a loaf of their bread when I was over there.

Q. What was your opinion of that product?—A. It was very good.

317 Q. Was it what you would call a modern loaf of bread or not?—A. It was, or was at that time.

Q. Based on your experience in the baking business, Mr. Englehart, would you say that—strike that. From your experience in the baking business in New Mexico, do you know what per cent of gross sales of a bakery business like and similar to Mr. Moore's bakery in Santa Rosa, New Mexico, would be profit? I am asking now whether or not your experience would give you that knowledge.

Mr. Napier: I would like to object to that, Your Honor. This witness has not shown to have ever owned or operated or been in a plant of like kind or character that Mr. Moore had, or in a like kind and character of territory, or under like kind and character of business conditions.

The Court: Overruled. Answer the question, yes or no?

Mr. Napier: Exception.

A. Repeat the question please.

Mr. Blythe: Would you read the question back please?

(Reporter reads the question.)

A. Yes.

Q. What would that percentage be?

Mr. Napier: We object, Your Honor, to his answering the question for the reasons we have stated immediately prior to the preceding question: namely, it isn't shown that the basis of comparison is of the same type or character or that the time is the same—.

The Court: That is the point I am thinking about. I think his general knowledge of the bakery business would be
318 sufficient to answer it. But I don't think you fixed any

time at all, Mr. Blythe. What time are you talking about, now or a year ago?

Mr. Blythe: If the Court please, I don't think these figures vary much from year to year.

The Court: I don't know whether they do or not.

Mr. Blythe: I will limit it to the years 1948 and 1949.

Mr. Napier: We will object to it.

The Court: Confine yourself to that period of time, and you may answer the question.

Mr. Napier: May I finish my objection.

The Court: You may finish.

Mr. Napier: It would be just a speculative answer on the part of the witness. The conditions weren't shown to be the same. It is an attempt to establish a basis of profit—.

The Court: Well, just state your objection. You don't have to argue the reasons.

Mr. Napier: The plaintiff is limited in this case, he is entitled to any damages—if he is entitled to any damages at all, to the damages he suffered, and it cannot be established—.

The Court: That is argument. What is your objection? Have you finished your objection?

Mr. Napier: I believe I have finished the objection.

The Court: Overruled. Answer the question.

A. I would have to get some comparative figures.

The Court: Well, that isn't the question. He asked what percentage. If you can answer that, you may. If you cannot, you may not.

319 A. The percentage of profit should be 10 to 12 per cent on that type of operation and in answer to counsel's question, I am not familiar with that type of operation, I have just about that same size of set-up in Farmington, at the present time.

The Court: Now, you are answering the objection. You needn't do that. Any other questions?

Q. Mr. Englehart, you say your plant in Farmington is similar to the one Mr. Moore had at Santa Rosa.—A. Just about the same, yes, sir.

Q. Is that your percentage of gross profit—.

Mr. Napier: Your Honor, we object.

The Court: That is right, sustain the objection.

Q. From your experience and knowledge of the baking business and after having seen Mr. Moore's bakery in Santa Rosa in 1949, could you express an opinion as to the value of the physical equipment and good will of a going business of that kind in Santa Rosa, New Mexico, prior to or on, let's say, September 2, 1948.

Mr. Napier: We object to that for the reason—.

The Court: Let him answer the question, yes or no. He is just asking if he can express an opinion. He can answer yes or no and then you can make objections later.

A. Yes.

The Court: Now state the next question.

Q. What was that value?

The Court: Now wait a minute, make your objection.

Mr. Napier: We object for the reason the witness has not shown to be qualified to *pas* upon the value of bakery equipment.

The Court: I doubt it. You included good will and the value of the business and various matters, and I doubt whether the witness has shown himself qualified to answer the question. Sustain the objection.

Q. Mr. Englehart, have you had any experience in the buying of baking equipment?—A. Yes, sir, I have.

Q. Did you buy the equipment for your plant up at Farmington?—A. Part of it, and part of it we got when we bought the business.

Q. In your experience in the baking business since 1917,

have you had occasion to buy much baking equipment?—A. I have.

Q. Would you be in a position to estimate the amount in dollars of the amount of baking equipment you have purchased at one time or another?—A. You mean over a period of years?

Q. Yes.—A. I would say 150 to 200 thousand dollars worth.

Q. Are you familiar with the values of baking equipment now?—A. I am.

Q. Were you in 1949 familiar with the values of baking equipment?—A. I was.

Q. Did your experience in the baking business give you a basis upon which to value a business that was a going concern, including its—value of the physical plant and the going concern of the good will value?—A. It did.

Q. Do you have an opinion as to the value of the physical plant, the actual equipment in Moore's bakery at Santa
321 Rosa at the time you were in his plant?

Mr. Napier: Your Honor, it isn't shown even what year this witness was in Mr. Moore's plant.

The Court: Fix the time.

Mr. Blythe: If the Court please, the witness said it was 1949 or 1950. He wasn't exactly certain.

The Court: Fix the time you are asking him as to values.

Q. At the time of your visit to Mr. Moore's plant in 1949 or 1950 as the case may be.

Mr. Napier: Your Honor, I think he should tie this down as to what date. It is very material to this lawsuit. The thing he is attempting to do here.

The Court: I think that is close enough for this answer. Answer the question.

Mr. Napier: Note our exception.

Q. What was the value?

Mr. Napier: May I ask that our objection—may I state our objection that this witness is not shown to be qualified as an expert to pass upon the value of the physical plant of Mr.

Moore. It hasn't been shown as to what Mr. Moore had in the plant at the same time, that is the same equipment was in there at all times during 1949 and 1950. I believe that is sufficient.

The Court: Overruled.

Mr. Napier: Note our exception.

The Court: What was the question? I have forgotten.

322 Mr. Blythe: The question was as to the value.

The Court: Do you ask him what the physical value of the plant was at the time he visited the plant in 1949 or 1950?

Mr. Blythe: Yes, Your Honor.

The Court: Answer the question.

A. Roughly around \$20,000.00.

Q. Do you include in that figure anything for going concern or good will value?—A. No, sir, I don't.

Q. Is the valuation you place on it the market value of the equipment?—A. I understood at the time I was there that the equipment was practically new and it looked new, and that would be the market value of it.

The Court: Of new equipment?

A. No, if you were buying it all at one time, Your Honor, as a going concern for the equipment alone.

The Court: I mean what was the value you placed on it, the value of new equipment at that time?

A. Yes.

The Court: All right, proceed.

Q. Does that equipment depreciate very much in use, Mr. Englehart?—A. No, your income tax schedule sets most of that up at 10 to 15 years.

Q. Actually has it been your experience that baking equipment has been depreciated appreciably since 1949?—A. No, sir. It has gone up since 1949 on account of the rise in steel and the rise in labor cost.

Q. Based on your experience in the bakery business

323 and the increase in prices of new equipment that you have just mentioned, would you be in a position to say whether or not the equipment that was purchased new in 1947 did depreciate in actual market value by the middle of the year 1951?—A. No, I think any rise in the market value of new equipment would take care of the depreciation that had *accrued* against the equipment.

Q. Would the same be true of equipment that was older than that but still serviceable?—A. Well, still serviceable? If a machine is old and still doing a job for the man that owns it and has it in his plant, it is worth a lot more to him than if he tried to sell it and trade it in.

The Court: I think that is getting a little speculative, Mr. Blythe. You will not consider the last answer of the witness in arriving at a decision in this case.

Q. Mr. Englehart, just one more question. Has your experience in the baking business in New Mexico since 1917 given you any basis upon which to estimate, with accuracy, the going concern value of a baking business?—A. It would.

Q. Would that experience enable you to estimate the going concern value of a plant like Mr. Moore's was in Santa Rosa, New Mexico? I mean in the same situation his was.—A. Well, I understood when I was over there he had lost quite a bit of volume—.

Mr. Napier: We object to anything he understood. It would be hearsay.

324 The Court: Sustained.

Q. At the time you were there, the price war with Mead's was over, wasn't it?—A. Yes, sir.

Mr. Napier: We object to him leading, Your Honor.

The Court: He may answer the question if he knows.

A. Yes, sir, it was.

Q. Did Mr. Moore's business have any going concern value at that time?

Mr. Napier: We object to that, Your Honor.

The Court: I think I will sustain that objection. If you mean by going concern, good will of the business.

A. Yes.

The Court: I think the witness would have to be qualified by showing knowledge of the amount of business done and a lot of things to which he hasn't testified. I don't know whether he has any knowledge or not. You will have to qualify him a great deal further before I will let him express any opinion on that.

Mr. Blythe: No further questions, Your Honor.

The Court: Cross-examine.

Cross-Examination by Mr. Napier.

Q. I believe, Mr. Englehart, you testified there had been little actual depletion in value of bakery equipment from 1946 to 1949, if I understood you correctly.—A. Yes, sir.

Q. So that the physical plant of Mr. Moore, assuming that it was about the same as it was when you saw it in 1949 or 1950, whichever time it was, was worth say \$20,-
325 000.00, or a figure of that approximate dimension, in January or February, 1949, it would still be worth about the same amount of money the following year, would it not?—A. It would be, because of the price rise in equipment.

Q. Yes, sir. And now you mentioned about getting one loaf of bread from Mr. Moore. Did you get more than one loaf? Did you check the quality from time to time, or just get the one loaf?—A. I just got the one loaf. There were several full *wracks* of bread sitting there when I got that loaf of bread.

Q. I believe you stated that the reasonable cash market value of the equipment Mr. Moore had in his plant in 1949 or 1950 when you were there was \$20,000.00?—A. Yes, sir.

Mr. Napier: Thank you, sir.

The Court: Any redirect examination?

Mr. Blythe: No redirect, Your Honor.

The Court: You may be excused.

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326 The Court: Any further testimony from the plaintiffs?

Mr. Blythe: Yes, Your Honor. May I inquire how long we intend—.

The Court: May I inquire how long you think your testimony will be?

Mr. Blythe: If the Court please, we have three more depositions.

The Court: Long?

Mr. Blythe: One of them is fairly long, and the other two are short.

(Off the record.)

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The Court: Call your next witness.

Mr. Blythe: E. E. Corcoran. This witness has not been sworn.

327 The Court: All right.

(Witness sworn.)

The Court: Now, Mr. Blythe, we have had some discussion about the use of depositions. And I think you have a deposition of this man's.

Mr. Blythe: I am not using it, sir.

The Court: That is fine. It is proper to use depositions, but not for the purpose of conducting a direct examination. Asking the witness if he didn't testify so and so at some other time. The purpose of such use of prior testimony would only be for impeachment purposes. And you will examine the witness directly, as you propose to do I'm sure.

Mr. Blythe: If the Court please, I would like permission to examine this witness as an adverse witness under the rule.

The Court: I understand you are calling him as an adverse witness.

E. E. CORCORAN, having been duly sworn, testified as follows:

Direct Examination by Mr. Blythe.

Q. State your name and address.—A. E. E. Corcoran, 2107 25th Street, Lubbock, Texas.

Q. Are you an officer of the Mead's Fine Bread Company of Clovis?—A. Yes, sir.

Q. What office?—A. Vice-President.

328 Q. Are you a stock of those two companies?—A. Yes, sir.

Q. Are you also a director?—A. Yes, sir.

Q. Now, with respect to the Mead's Fine Bread Company of Lubbock, are you an officer, stockholder, and director?—A. Yes, sir.

Q. What office do you hold in that corporation?—A. Vice-President.

Q. Mead's Fine Bread Company of Chaves County. Are you a stockholder, officer, and director of that corporation?—A. Yes, sir.

Q. What office?—A. Vice-President.

Q. Are you also an officer, director, and stockholder of Mead's Fine Bread Company of Hebbs?—A. Yes, sir.

Q. What is your office in that corporation?—A. The same.

Q. You are also in charge of sales of the Mead's Fine Bread Company in Clovis, are you not?—A. Yes, sir. At present I am operational manager in charge of the plant there; sales and production.

329 Q. A little louder, please.—A. I am operational manager of the Clovis plant in charge of sales and production, too.

Q. Were you in charge of sales and production in the Clovis plant on September 3, 1948?—A. I was in charge of sales. I wasn't in charge of production, no, sir.

Q. At that time did you reside in Lubbock, Texas?—A. Yes, sir.

Q. Did you supervise those sales from Lubbock, Texas?—A. Well, I lived in Lubbock. I made trips to the plants out.

Q. Frequent trips?—A. Well, pretty frequent, yes, sir.

Q. How often would you say?—A. Oh, probably every ten days.

Q. Did the Mead's Fine Bread Company operate a bread route into Farwell, Texas from Clovis, New Mexico at any time?—A. Yes.

Q. We have stipulated to that *fact*, except I don't believe we had the closing date. I believe you are not so operating now. Is that correct?—A. No, sir.

Q. Do you know when you discontinued the last time?—A. No, sir, I could not give that date.

50 The Court: I think your stipulation said the latter part of the year 1950.

Mr. Blythe: 1951.

The Court: 1951. All right.

Q. Is that approximately correct?—A. I couldn't say without checking.

The Court: That is covered by the stipulation.

Q. What was the prevailing wholesale price of sliced white bread per pound loaf and pound-and-a-half loaf in the area served by Mead's Fine Bread Company of Clovis on September 2, 1948, if you know?—A. Well, I believe it was 14 and 21.

Q. Fourteen cents a pound loaf and 21 for a pound-and-a-half? Is that correct?—A. I believe so.

Q. Did that price prevail in Farwell, Texas as well as Santa Rosa, New Mexico?—A. Well, I couldn't say for sure about that. We have two different prices in that territory, and I couldn't say.

Q. Did you at that time have two different prices?—A. Well, I don't remember about that. That is what I say; I couldn't say for sure whether they were the same at that time or not.

Q. There wouldn't be much difference, if any?—A. No.

331 Q. Probably not more than a cent or two?—A. Probably a cent, if any at all.

Q. Was there any place on that date you were selling bread for 7 cents a pound loaf and 14 cents a pound-and-a-half loaf?—A. No, sir.

Q. Correction. Eleven cents a pound-and-a-half loaf?—A. No, sir.

Q. You, of course, are familiar with the fact that Mead's Fine Bread Company did cut its wholesale prices in Santa Rosa on September 3, 1948 to 7 cents a pound and 11 cents a pound-and-a-half loaf?—A. Yes, sir.

Q. Who ordered that cut?—A. Well, I did.

Q. You did that in your capacity as sales manager?—A. Yes, sir.

Q. Do you know when that cut was restored? That is, when prices were restored to the former figure?—A. You mean to the 14 and 21?

Q. Yes.—A. I believe it was in April of '49.

Q. Would April 26 be the date?—A. I believe that is correct.

Q. And that is approximately eight months, just slightly less than eight months that the price cutting continued, isn't it?—A. Yes, sir.

Q. You are now in charge of production of the Clovis plant?—A. Yes, sir.

Q. As such you are familiar with the cost of production of bread, are you not?—A. Well, yes, sir, some.

Q. Was it possible during the period of this price cutting to produce and sell bread at a cost of 7 cents a pound loaf?—A. No, sir.

Q. And that was below the cost of production?—A. Well, yes, sir, I would say it was.

Q. How much below the cost of production?—A. Well, I couldn't answer that without going back and checking. Your cost of production will vary.

Q. How much profit do you ordinarily expect to make on bread?—A. I would just have to check on that and see to give you an exact figure.

Q. Seven cents was considerably below cost of production, wasn't it?—A. Yes, sir. Cost of production and sales,
333 yes, sir.

Mr. Skarda: Your Honor, would you have the witness speak a little louder?

The Court: Yes, Mr. Witness. It is very difficult to hear in this room. Speak loud enough for counsel at the table to hear you and the last juror in the box.

A. I'm sorry.

Q. At the time of this price cut, September 3, 1949, what competitors did Mead's Fine Bread Company have in Santa Rosa, New Mexico?—A. I believe at that time Mr. Moore was the only competitor we had.

Q. Mr. Corcoran, what happened to your bread sales in Santa Rosa after this price cut started. Did they increase or decrease?—A. I would have to check. I just don't remember.

Q. Well, you know, as a matter of fact, it increased rather sharply.—A. I would just have to check it.

Q. Do you know what the retail price of bread was in Santa Rosa, that is, of your bread during that period?—A. Well, I think most of the merchants sold it for 10 and 15.

Q. Ten cents a pound and 15 cents a pound and a half?—A. Yes, sir, I believe that is right.

Q. As a matter of fact, you told them that was
334 what they were supposed to sell it for?—A. No, sir, I didn't tell them to sell it for any certain price.

Q. Didn't you go around and paint signs on their windows and put signs on doors telling what price Mead's bread was retail?—A. The only places I did that was where they asked me to.

Q. Who asked you to.—A. The merchant.

Q. What merchants?—A. The places where we got back in with this bread.

Q. What places?—A. Well, I believe People's. and O. K. Grocery and Lilly's Grocery. And that is all I can recall that put signs up.

Q. The merchants in charge of those stores asked you to put signs on the windows?—A. Yes, sir.

Q. And so you did.—A. Yes, sir.

Q. I ask you whether or not you brought in signs already painted and put them up?—A. No, sir, I didn't.

Q. You painted them right on the spot?—A. Yes, sir.

Q. Who did that? You?—A. Well, I don't recall

335 whether I did or whether probably it was someone with me.

Q. Do you know who was with you?—A. I am not sure. I think Mr. Carr went with us. I am not sure about that.

Q. Who is Mr. Carr?—A. He was a man working with us at that time.

Q. Would that be Mr. Hubert Carr that used to be in charge of your Clovis plant?—A. Yes, sir.

Q. I hand you herewith Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4 and ask you if you can tell us what those are?

Mr. Napier: May we approach the bench, please, sir?

The Court: Yes, sir.

(Off the record.)

(Out of hearing of the Jury.)

Mr. Napier: The plaintiff is now seeking to establish commerce on the part of the defendant by showing a joint ownership and joint control of the defendant's corporations by establishing a contract for flour, the same being Exhibit—whatever it happens to be. In order for the plaintiff to establish commerce by so proving the acts of a Texas corporation to be the acts of a New Mexico corporation, is to
336 prove or establish facts tending to prove that the corporate entity itself was being used for some unlawful purpose. And we except it on the ground that the evidence is not material to the particular issue before the Court.

The Court: In the light of the fact that this witness has been called as an adverse witness, the objection is overruled.

Mr. Napier: Thank you, sir.

(Proceedings resumed before the Jury.)

Q. Will you answer the question, Mr. Corcoran, as to what these two exhibits, Plaintiff's Exhibits 3 and 4, are?—A. Those are flour contracts.

Q. They are from the Mead's Fine Bread Company of Clovis, are they not?—A. Yes, I believe that's right.

Q. Now, these contracts were actually made in Lubbock, were they not?—A. Well, I couldn't answer whether—just whether they were made at Lubbock or at Clovis.

The Court: Between whom are the contracts, Mr. Blythe?
Mr. Blythe? Sir?

The Court: Between whom are the contracts?

Mr. Blythe: Harvest Queen Mill & Elevator and Mead's Fine Bread Company of Clovis.

337 A. Yes, sir.

Q. Aren't there notes in here some of this flour is to be shipped to Lubbock, Big Spring, Roswell, in addition to Clovis?—A. Yes, sir.

Q. In other words, this was a joint order of flour, wasn't it?—A. Yes, sir, I'm sure that's right.

Mr. Blythe: We offer in evidence Plaintiff's Exhibits 3 and 4.

The Court: They are admitted subject to the objection made at the desk, and the same ruling, and exception, of course. Proceed.

Q. I hand you herewith Plaintiff's Exhibit 5, and ask you if you can remember supplying any of those figures?—A. Well, I believe this is what we gave in my deposition.

Q. They represent sales of Mead's Fine Bread Company in Santa Rosa, do they not?—A. Yes, sir.

Q. Bread sales?—A. Yes, sir.

Q. Can you tell us what these various totals are, what they mean?—A. Well, I would just have to check that, Mr. Blythe. I just couldn't offhand remember what those are. That has been quite a while back.

Mr. Blythe: Very well. No further questions.

338 The Court: Any questions, Mr. Napier, of this witness? Or Mr. Houk?

Mr. Napier: We can conserve time, Your Honor, by my completing with this witness at this time, if there is no objection.

The Court: All right.

Cross-Examination by Mr. Napier.

Q. Mr. Corcoran—.

The Court: The rule gives you the right to examine the witness about as liberally as the other party.

Q. Mr. Corcoran, you are not related to the Mead family.
—A. No, sir.

Q. Billy Mead or Mack Mead or W. L. Mead.—A. No, sir.

Q. How long have you been in the bakery business?—
A. Oh, since '28.

Q. Now, then, you, of course, are familiar with this unfortunate situation that arose at Santa Rosa?—A. Yes, sir.

Q. In September, 1948? When did you first learn about that?—A. Well, I believe I learned about this petition the evening before it went into effect the next day.

Q. And did you go to Santa Rosa?—A. Yes, sir, I went to Santa Rosa on the 3d, I believe, of September.

339 Q. About what time of day did you get up there?
—A. I don't remember. I would say somewhere around ten or ten thirty.

Q. When you arrived, what did you do?—A. Well, I went and called on these merchants, and tried to talk them out of this boycott.

Q. Were they refusing to buy your bread?—A. Yes, sir.

Q. And other bakery products at that time?—A. Yes, sir.

Q. When you arrived there, who did you talk to?—A. I think I talked to every merchant we were selling at that time.

Q. And did they all refuse?—A. Yes, sir, with the exception of Mr. Lilly, and he never did sign the boycott, I don't think.

Q. You had no market in Santa Rosa that morning of September 3, 1948, except for Lilly's Grocery, is that right.
—A. That's right.

Q. Will you describe Lilly's Grocery to the Jury, please, sir?

Mr. Standley: Your Honor, we still can't hear the witness.

340 The Court: Speak louder, Mr. Corcoran.

A. Will you repeat the question, please? I'm sorry.

Q. Will you describe Lilly's Grocery to the Jury?—A. You mean the location of the store?

Q. What size store was it? What was the principal business?—A. It was just a small store. And he sold quite a bit of bread, and I think quite a bit of milk and groceries, and I think served maybe sandwiches to the school children. His store was I believe just across the street from the school.

Q. All right. Did it compare in size with Moise's or Square Deal or Brown's Grocery?—A. No, sir.

Q. It was a small store as compared to those three, wasn't it?—A. That's right.

Q. All right. What did you do? First, I will ask you this question: When did you first go into the Santa Rosa market?

—A. It was in January in 1948, I believe. It was in January sometime.

Q. What did you do in the way of advertising when you went in?—A. Well, I don't recall any particular thing we did other than I am sure we gave away little miniature loaves of bread. That is about all I can recall of us having
341 done.

Q. Did you do anything out of the ordinary when you went into that market in Santa Rosa?—A. No, sir.

Q. Did anything occur or anything happen between Mead's and Mr. Moore from the time you went into the market January 31, or January '48 and September 3, 1948?—A. No, sir.

Q. Was any unpleasantness of any kind between you?—A. None that I ever knew of.

Q. Now, you found yourself that morning of September 3, 1948, without a market in Santa Rosa, and you talked to the merchants there. And did you ask them to take your bread?—A. Yes, sir.

Q. And did they refuse?—A. Yes, sir.

Q. In connection with this testimony I would like to ask you if you have had occasion to examine in the last few hours, to examine four of your route books for Santa Rosa, and whether or not a store by the name of Jack's Court—did a place by the name of Jack's Court appear to be buying bread from you in your route books?—A. No, sir.

Q. Well, what did you do? What did you do, sir? What could you do when you found out you didn't have your market in Santa Rosa?—A. Well, I thought about a lot of
342 things, and about the only three alternatives I could

come up with, we could do, would be either to quit the market, which we didn't want to do; or give our bread away, which we didn't want to do, it had cost too much—.

Mr. Blythe: If the Court please, the plaintiff will object to this line of questioning and this witness' answer on the ground it calls for a conclusion of the witness. This declaration is purely self-serving, something that went on in his mind, which will have to be established by his external acts.

The Court: Overruled. Proceed.

A. We didn't want to give our bread away. So I thought that was our best alternative, to stay in the market and have some outlet for our bread.

Q. Why did you cut the price of bread?—A. Well, I thought that would be the quickest way to break this boycott down and get back in the market like we had been.

Q. Now, then, how many customers did you have immediately before the boycott?—A. I believe it was eleven outlets we had.

Q. Did you have Square Deal?—A. Yes, sir.

Q. Moise's?—Yes, sir.

Q. Brown's?—A. Yes, sir.

343 Q. Ernie's?—A. Yes, sir.

Q. People's?—A. Yes, sir.

Q. O. K.?—A. Yes, sir.

Q. Jack's Grocery?—A. Yes, sir.

Q. Lilly's?—A. Yes, sir.

Q. Pueblo?—A. Yes, sir.

Q. Community?—A. Yes, sir.

Q. Balboa?—A. Yes, sir, I believe that is correct.

Q. Now, then, immediately after the boycott, how many did you have?—A. Well, of course, that morning we only had the one, and couldn't get back in any of them. And when we cut the price of bread, I believe we got, including Mr. Lilly's, I believe we got, we had, six stops.

Q. Including Mr. Lilly's?—A. Yes, sir.

344 Q. That left five outstanding?—A. Yes, sir. They were the small stores. We didn't get in the large stores, didn't get back in them.

Q. Now, then, you raised the price of your bread on April 26, 1949?—A. Yes, sir.

Q. Was *Square Deal* buying bread from you then?—A. No, sir.

Q. Was *Moise's* buying bread from you then?—A. No, sir.

Q. Was *Jack's Grocery* buying from you then?—A. No, sir.

Q. Was *Brown's*?—A. No, sir.

Q. When did *Square Deal*—has *Square Deal* started buying bread from you?—A. They are buying it now.

Q. When did they start?—A. Well, I believe it was in February of '50. I am not sure.

Q. Well, I will ask you whether or not they started the day following the date that Mr. Moore closed his plant?—A. I believe that's right.

Q. Was the same true of *Moise's*?—A. Yes, sir.

345 Q. Was the same true of *Brown's Grocery*?—A. Yes, sir.

Q. Was the same true of *Jack's Grocery*?—A. I think that's right, yes, sir.

Q. What were the largest stores in town?—A. Well, *Moise's* and *Brown* and *Square Deal* are the largest stores; were then.

Q. *People's* was what? A grocery store or dry goods store?—A. It was both. He had dry goods and groceries.

Q. Where were the groceries located in the store?—A. I believe in the back on one side.

Q. And the dry goods in front?—A. I believe that's right.

Q. Where were the groceries located in the *O. K. Store*?—A. I believe they were along the side, one side of his store.

Q. It was also a dry goods and notions store?—A. Yes, sir.

Q. I will ask you whether or not those would probably be the next ones in size?—A. Yes, sir.

Q. Underneath *Square Deal*, *Moise's*, and *Jack's* and *Brown's*?—A. Yes, sir.

346 Q. Now, Mr. Corcoran, I will ask you whether or not you can make a customer out of a man, out of a merchant, by bringing a suit against him to compel him to buy your products?—A. Well, I wouldn't think so.

Mr. Standley: Your Honor, we ask that the answer be stricken. That is not proper examination of this witness and

calls for the conclusion of the witness. It is a legal conclusion at that.

The Court: Well, he has already answered it. Proceed. Let's get along with the questions.

Q. What did you cut the price on in Santa Rosa? What product?—A. White bread.

Q. Did you cut the price of bread anywhere else?—A. No, sir.

Q. Did you cut the price of any other products? In Santa Rosa?—A. No, sir.

Q. Did you cut the price of any other products in or out of Santa Rosa anywhere?—A. No, sir.

Q. I will ask you whether or not Mr. Moore during the price-cutting period started making some other towns in competition with Mead's?—A. Yes, sir.

Q. Did you cut the price in those places?—A. No, 347 sir.

Q. On any item?—A. No, sir.

Q. Was there ever a time in the town of Santa Rosa that Mr. Moore's bread, or any other product he made or sold, was off the shelves until he closed his business?—A. Not that I know of, no, sir.

Q. I will ask you to state whether or not Mr. Moore's products were setting alongside your products at all times?—A. Yes, sir.

Q. And in all places?—A. Yes, sir.

Q. Was there times when your products were not setting alongside Mr. Moore's?—A. You mean during this—.

Q. At any time.—A. Well, of course, they weren't during this boycott.

Q. All right, sir. How about after your raised your prices?—A. Well, we didn't get back in these—.

Mr. Standley: Your Honor, counsel hasn't identified where he is talking about.

Mr. Napier: Santa Rosa.

The Court: Go ahead. Answer the question.

348 Q. Santa Rosa.—A. After we raised the price of bread, we did not get back in these larger stores for a long time.

Q. If the merchants at any time had ever offered to take your bread—if the boycotting merchants had at any time offered to take your bread—would you have raised your prices?—A. We would have been glad to

Mr. Blythe: If the Court please, this is calling for the conclusion of the witness. We would like to renew our objection to these questions asked him for his reasons why he did things.

The Court: Overruled.

Q. Answer the question.—A. Repeat the question, please.

Q. If the merchants had at any time offered, the boycotting merchants, had at any time offered to take your bread, would you have increased your prices back to 14 and 21?—

A. Yes, sir, we would have been glad to.

Q. Was this price reduction, or each sale of this bread at the reduced price, directed at Mr. Moore?—A. No, sir.

Q. Who was it directed at, sir?—A. To break this boycott so that we could have an outlet for our bread.

Q. Was that true the entire time?—A. Yes, sir.

Q. Of the period of the price reduction?—A. Yes,
349 sir.

Q. Now, then, do you recall the occasion when Mr. Moore closed his business?—A. Yes, I remember.

Q. I will ask you whether or not a bread was immediately brought into Santa Rosa in competition with you?—A. Yes, sir.

Q. Who came in?—A. Superior, out of Las Vegas.

Q. I will ask you whether they came in with reference to the day that Mr. Moore closed?—A. I believe they came in the first day that Mr. Moore did not operate.

Q. Did Mr. Moore have one-day old bread on the shelves the day that Superior Baking Company came in?—A. Yes, sir.

Mr. Napier: That is all.

The Court: Anything further?

Redirect Examination by Mr. Blythe.

Q. Mr. Corcoran, you have said that the purpose of this price cutting wasn't to drive Mr. Moore out of business, is that right?—A. That's right.

350 Q. And yet you continued this price war for almost eight months, didn't you?—A. Yes, sir.

Q. You realize, of course, that the boycott as you call it, the petition, or whatever it was, collapsed immediately upon the start of the price cutting, don't you?—A. Well, it didn't collapse in the big stores.

Q. You got back into practically all these stores the very first day, didn't you?—A. We got back into some of the smaller ones. We didn't get back into the larger ones.

Q. The combination or agreement among the merchants wasn't even effective one day.—A. Part of one day, yes, sir.

Q. Just a matter of a few hours.—A. We got back in some of these smaller stores the day it started.

Q. How many of these merchants held out for any length of time; that is, a week or more?—A. Well, the larger stores—.

Q. What do you call the larger stores?—A. Moise's, Brown's, Square Deal.

Q. Were you ever in those stores—that is, did you sell bread in these stores before the petition?—A. Yes, sir.

Q. Are you sure you sold bread in the Square Deal
351 Market?—A. Yes, sir, I am pretty sure we did.

Q. Are you very sure?—A. Yes, sir, I am sure we sold them bread.

Q. If—strike that. Did you sell any bread in Mr. Moise's grocery before this petition was circulated?—A. Well, I thought we did, yes, sir.

Q. Well, can you say of your own knowledge that you did?—A. I wouldn't say positive that we did, but I thought we were in that store.

Mr. Napier: Your Honor, the plaintiff himself said this defendant did. He is trying to impeach his own witness.

The Court: He has answered the question. Proceed.

Q. I ask you whether or not you were selling bread in Brown's store before the petition was circu'ated?—A. Yes, sir.

Q: You are positive of that?—A. Yes, sir.

Q. I ask you whether or not you were selling bread in Jack's Court before the petition was circulated?—A. Yes, sir.

Q. A minute ago you didn't seem to know who Jack's Court was; what store that was.—A. Well, I think there is a little confusion there.

Q. You remember now?—A. Yes, sir.

352 Q. You are positive you were selling bread in that store or court before September 3, 1948?—A. Yes, sir.

Q. Then how many stores held out more than one day?—

A. Well, there was Brown's and Meise's and Square Deal and Jack's. That is all I can recall just offhand.

Q. Jack's was just a little place, wasn't it?—A. Yes, sir, it wasn't a very large store.

Q. So the larger stores you were trying to force your way into were Brown's and Square Deal and Moise's?—A. They were the stores we wanted to get back in.

Q. They were the main stores?—A. Yes, sir.

Q. You said you sold bread in all three of those stores before the petition was circulated, is that right?—A. Yes, sir.

The Court: That petition, Mr. Blythe. You are going over the same things.

Mr. Blythe: It is very important, Your Honor.

Q. I ask you whether or not the People's Store is run by Mr. A. M. Hurtado, or was at the time this petition was circulated?—A. I couldn't say for sure about that myself, no, sir.

353 Q. Well, it has been your testimony that whoever was in charge of People's Store authorized you to paint or asked you to paint signs on the windows regarding the prices of bread. Is that right?—A. That's right.

Q. And if Mr. Hurtado ever testified in a deposition that such wasn't the case, is he lying.

The Court: I never think it is proper to ask a witness whether another witness is lying or telling the truth.

Mr. Napier: Mr. Blythe, I also think it is improper.

The Court: It is for the Jury to determine and not the subject of testimony on the part of another witness.

Mr. Napier: This is a new subject he is going into with this witness. It isn't a redirect examination. It isn't a proper subject of examination.

The Court: This last statement of the witness has been taken care of. Proceed.

Q. Do you know Jack Coikus?—A. Well, I don't know him by that name. Probably I know him.

Q. Did you know him as the owner and operator of Jack's Court at that time?—A. No, sir, I couldn't say for sure.

Q. You weren't acquainted with whoever operated it?—A. I can't remember that particular fact.

Q. You don't remember having any conversations
354 with Mr. Coikus?—A. Well, probably I have been in his store, and maybe talked with him about selling bread. But I couldn't say for sure about that.

Mr. Blythe: That is all.

(Witness excused.)

355 MILTON MOISE, having been first duly sworn, testified as follows:

Direct Examination by Mr. Blythe.

Q. State your name and address.—A. Milton Moise. I live at Santa Rosa, New Mexico.

Q. You operate a grocery store in Santa Rosa?—A. Yes, sir. Kind of a general store in Santa Rosa.

Q. What is the name of that store?—A. Moise Brothers Company.

Q. You handle groceries in that store?—A. Yes, sir.

Q. Including bread, of course.—A. Yes, sir.

Q. I ask you whether or not prior to September 3, 1948, you ever handled Mead's bread in your store?—A. I don't know the exact date when I started handling Mead's bread, but it was just about the time Moore's Bakery closed up.

Q. Do you remember the price war that went on there for several months?—A. Yes, I recall them selling bread for ten cents there in town.

Q. Did you handle any of that cheap bread?—A. No, sir, I didn't.

Q. Did you before that price war started ever
356 handle any of the Mead's bread?—A. No, sir, I didn't. I don't think so.

Q. Was their bread offered to you at any price less than the regular wholesale price during this price war?—A. I don't know at what price it was offered to me, but I knew what price they were selling it for there in town. They did offer to sell me bread. I don't know at what price. I don't remember.

Q. But you refused to buy it, is that right?—A. Yes. We were in the position that we wanted to support a home-town industry, and we were trying to buy our bread from the local industry.

Q. Did you ever see a petition that was circulated among the merchants of Santa Rosa regarding the sales of bread?—A. Yes, I think there was a petition in regard to that, something of that nature. It has been so long ago. But I think I did not sign it. I told them I thought that my word was as good as if I signed the petition, as I recall.

Q. Do you remember who brought that petition around to you?—A. No, I don't recall. But the thing I do recall, that they had some kind of meeting of all the merchants and restaurant operators and people that purchased bread at wholesale there in Santa Rosa, and I think at that time
357 Moore's were figuring on moving to Tucumcari, or at
least that was what some of the Moore boys had told
us.

Q. Did Mr. Moore bring the petition around to you?—A. I don't recall.

Q. Were you under Mr. Moore's control or domination in any way during this period?—A. No, sir.

Q. Were you obligated to him in any manner?—A. No, sir.

Q. How big is Santa Rosa? What is its population?—A. Oh, around 2,000; maybe a few more.

Q. What was the population back during the period of this price war?—A. I don't think there has been a great deal of difference in growth of population or decline either.

Q. Did you lose any business as a result of not handling this cheap bread?

Mr. Napier: We object, Your Honor.

The Court: I don't see what his loss of business would have to do with the case, Mr. Blythe. Sustain the objection.

Mr. Blythe: Nothing further.

Cross-Examination by Mr. Napier.

358 Q. One question. You have the largest merchantile establishment in town, don't you, Mr. Moise?—A. I don't know if we do the largest grocery business.

Q. I did not ask you that. But you have the largest merchantile establishment.—A. I think that is correct.

Q. How many departments do you have?—A. At the present time—I think at that time just handled groceries, feed, and hardware.

Q. Yes, sir. For a town of that size that store is a compliment to the town, isn't it? It is a sizable institution, isn't it?—A. I like to think so.

Q. And you do an agreeably tremendous business, do you not?—A. We have done a good business for a long time.

Q. You have managers in your departments?—A. Yes, sir.

Q. And you have ranching interests.—A. Yes, sir, that is correct.

Q. And you have to look after those interests in addition to this store in Santa Rosa.—A. That is correct.

Q. And you are not exactly familiar with everything that goes on in that store.—A. I am familiar with what they buy.

Q. Altogether?—A. At that time I will say I did
359 all the grocery buying and formed the policy. At any time they wanted to take on a new line I was always the one that said whether they bought it or not.

Mr. Napier: If you will pardon me for just a moment?

The Court: Let's proceed, Mr. Napier.

Mr. Napier: May I read this statement?

The Court: No, we can't pause for counsel. You may be excused.

(Witness excused.)

36 LORENZO MARQUEZ having been first duly sworn, testified as follows:

Direct Examination by Mr. Standley.

Q. State your name.—A. Lorenzo Marquez.

Q. Speak quite loud, Mr. Marquez.—A. Lorenzo Marquez.

Q. Where do you live?—A. Santa Rosa, New Mexico.

Q. What is your business in Santa Rosa?—A. I am in the appliance and hardware business.

Q. Are you in the grocery business?—A. No, sir.

Q. Were you in the grocery business between September 3, and April 26, '48 and '49; September 3, '48 and April 26, '49?—A. Yes, sir.

Q. What establishment were you in?—A. Square Deal Food Market.

Q. I will ask you did you ever purchase bread from Mead's Bakery prior to the price cutting?—A. No.

Q. When did you first purchase bread from Mead's Bakery.—A. When Moore's Bakery went out of business, I bought bread from Mead's.

Q. What was the season that you didn't purchase
361 Mead's bread when it was offered to you?—A. The only reason I had was Moore's Bakery was a local bakery. He was a home town bakery and local boy. That is why I was buying my bread from Moore's.

Q. It employed several local people?—A. Yes, sir.

Q. And you were trying to maintain the home town bakery?—A. That's right.

Q. At the time of September 3, 1948, when Mead's decided to cut prices, were you offered their bread at the reduced price?—A. Yes.

Q. Do you know the price?—A. I think it was seven cents wholesale.

Q. For the pound loaf?—A. Yes.

Q. And how much for the—A. I don't remember. I didn't buy it.

Q. Did they tell you how much it had to be sold for?—A. No.

Q. Is that an understood thing?—A. I don't know. I just didn't buy it.

Q. Well, there is an established amount of money that the merchant makes on bread. Is that right?—A. Yes, sir.

362 Q. How much is that or was it at that time?—A. Well, I think it was 14 cents a loaf for the pound loaf.

Q. That is what they sold it to you for at that time—A. Yes.

Q. And what did you retail it at?—A. I think 18 or 19 cents.

Q. You were not under Mead's control whatsoever, were you?—A. No.

Q. He didn't have any control over you at all?—A. No, sir.

Q. Did you sign the petition?—A. I don't remember.

Q. Did you know about the petition?—A. Well, being so far back, I just don't remember. I couldn't say one way or the other.

Q. But you were buying from him at that time, were you not?—A. Yes, sir.

Q. Buying from Moore's at that time and didn't propose to change.—A. No, sir.

Q. You were not under Moore's control? That is what I intended to say. I said Mead's.—A. No.

Q. You were not in any way under Moore's control?—A. No.

363 Q. When did you go out of the grocery business?—A. I went out last year in April.

Q. What competition did Mead's have in Santa Rosa after Mr. Moore went out of business?—A. Superior Bakery from Las Vegas, New Mexico.

Q. Do you know the grocery buying habits in Santa Rosa pretty well?—A. I think so.

Q. Did Mead's have most of the business after Mr. Moore went out of business?—A. I think so, yes.

Q. They successfully gained the market there?—A. Right.

Q. When—I asked you about this petition. Do you know whether Mr. Moore circulated that petition?—A. I don't know.

Q. Did he bring it to you?—A. No.

Mr. Standley: That is all.

The Court: Cross-examine?

Mr. Napier: No questions at this time.

(Witness excused.)

364 JACK COIKUS, Having been first duly sworn, testified as follows:

Direct Examination by Mr. Blythe.

Q. State your name and address?—A. Jack Coikus, Santa Rosa.

Q. You will have to speak pretty loud for these jurors up here to hear, Mr. Coikus.—A. O. K.

Q. What business are you in in Santa Rosa?—A. I was in a little grocery store business.

Q. You mean in 1948 and 1949?—A. Yes, sir.

Q. Are you any longer in that business?—A. No, I am discontinued now. I am not operating any more.

Q. Were you handling Mead's bread at the time that price cutting started there?—A. I handled Mead's bread when it first came in there. But after they cut the price down, I quit them.

Q. What was your reason for that, Mr. Coikus?—A. Because I didn't like it.

Q. You didn't like the price cutting?—A. I didn't like the price cutting, trying to push the other fellow out.

365 Mr. Houk: If the Court please, that is all voluntary—.

The Court: You will not consider the answer of the witness just given in arriving at a verdict in this case.

Q. Did you ever resume handling Mead's bread before you went out of business?—A. Before Moore goes out of business?

Q. No, before you went out of business.—A. No.

Q. You never did?—A. Oh, I did. After I quit them I didn't get any more bread.

Q. Even after they quit cutting prices?—A. Yes, sir.

Q. Do you remember a petition that was circulating among the merchants?—A. I know they discussed it, but I never did sign any petition.

Q. Was it brought around to you?—A. No, sir.

Q. You never saw it?—A. I never saw it. I heard they was talking about it.

Mr. Blythe: Nothing further.

The Court: Cross-examine.

Cross-Examination by Mr. Napier.

366 Q. You had a brother that ran the store, didn't you?—A. No.

Q. Are you Jack or J. A.?—A. J. A.

Q. Didn't Jack work for you?—A. Yes, sir.

Q. Didn't he run the store?—A. I was running the store.

Q. Didn't he run it part of the time?—A. No.

Q. You say he didn't? If he gave a statement to the effect he did, would that change your answer any?—A. No, sir.

Q. Did he work in the store?—A. No, he worked in the cafe.

Mr. Napier: No further questions.

The Court: Re-direct?

Re-Direct Examination by Mr. Blythe.

Q. Mr. Coikus, this cafe is also known as Jack's Cafe?—A. Yes, sir.

Q. It also handled—A. It was in Jack's name.

367 Q. Did you sell bread in that cafe otherwise than through meals?—A. No, sir.

Q. Do you have an interest in that cafe?—A. Yes, sir.

Q. Did you at this time in 1948 and 1949?—A. Yes, sir.

Mr. Blythe: That is all.

(Witness excused.)

368 Mr. Blythe: If the Court please, we would like at this time to read into the record the deposition of Mr. A. M. Hurtado taken June 30, 1949, at Santa Rosa, New Mexico.

Pursuant to an agreement between the parties dated the

27th day of May, 1949, and filed of record in this cause, the following depositions were taken before E. E. Greenson, a notary public and Official Court Reporter for the United States District Court for the District of New Mexico, on the 30th day of June, 1949, in the County Court House at Santa Rosa, New Mexico, beginning at 9:15 a. m.

Cross-Examination by Mr. Blythe.

Q. Mr. Hurtado, this statement that Mr. Napier just read to you a little while ago, he wrote that, didn't he, and not you?—A. Yes, he brought it already written, and I signed it is all.

Q. And your testimony now is accurate, isn't it? I mean you would be more accurate than that statement.—A. Yes. That part about not handling Mead's bread, I didn't know anything about it because I didn't read the petition.

Q. Did you read this statement before you signed it?—A. Yes. I told him about that—he had Coury in there.

Q. You told him when you signed the statement it wasn't accurate?—A. That's right. I never did read the petition, and that part about not handling Mead's Bread I didn't
369 know anything about it.

Q. When you signed the petition, you understood you were agreeing to handle Moore's bread, but you didn't understand you were to cut out Mead's?—A. That's right.

Q. Did you ever cut out Mead's?—A. No, I never did.

Q. As a matter of fact, did anybody ever tell you that the purpose of that petition was to run Mead's out of town?—

A. No, they told me after the petition was signed, they told me they wanted me to quit buying Mead's bread.

Q. That was afterwards?—A. Yes, sir.

Q. Who told you that?—A. *On*, some fellow on the street, some outsider. He asked me, "Did you sign a petition to keep Moore in town," and I said, "Yes." and he said, "You are going to keep buying Mead's Bread," and I said, "Yes, I am selling more Mead's than Moore's, and I am looking out after my interest."

Q. How many loaves of bread, on the average, were you selling before this petition circulated?—A. Oh, I was selling probably ten or fifteen altogether.

Q. Of Mead's?—A. Yes.

370 Q. How many of Moore's?—A. Sometimes none. Some days I would sell one or two.

Q. Was this before the price was cut?—A. Yes.

Q. Then what happened after prices were cut?—A. After the price was cut, I sold probably thirty or forty, or fifty loaves of Meads, and I wouldn't sell none of Moore's.

Q. And the price has gone up again on Mead's bread, hasn't it?—A. Yes.

Q. How many loaves of Mead's bread do you sell now?—A. Fifteen to twenty.

Q. How many of Moore's?—A. Some days one; some days none. The most I sell is two loaves.

Q. It is back now to about what it was before the price was cut?—A. Yes, sir.

Q. Who told you the price on Mead's was going to be cut?—A. The salesman that delivered it.

Q. Do you know his name?—A. No. Some of the officers from Mead's, not here. I don't know their names.

Q. Do you know whether it was Mr. Corcorran or not?—A. The big fellow?

Q. I don't know Mr. Corcorran.—A. I don't know.
371 Two fellows come in here. They were in the store, and at the time I told them I was going to handle Mead's bread. I told them the idea is this, "I will keep on handling your bread with the understanding you furnish bread to me. And if in case somebody runs you out of town, Moore will quit selling bread to me," and this fellow told me, "We will guarantee you will get bread here."

Q. Did Mr. Moore tell you he would quit selling you bread?—A. No, sir.

Q. It was just your idea?—A. Yes, sir, he never said anything to me about it one way or the other.

Q. Did they tell you what you would have to sell this bread for?—A. Yes, sir.

Q. What prices?—A. Ten cents and fifteen cents.

Q. What were the wholesale prices?—A. Seven and eleven, I think, seven and twelve. You only make three cents a loaf.

Q. And they told you you would have to continue to make just this same three-cent margin?—A. They told me to keep selling it like they told me to raise it up. This delivery boy that is here now, and he told me several weeks ago, the

372 bread is going up to the old price, seventeen and twenty-four.

Q. You mean seventeen and fourteen the wholesale price?

—A. The wholesale price was fourteen and twenty-one.

Q. Fourteen cents for a pound loaf, and twenty-one for a pound and a half?—A. Yes.

Q. And you retail it for seventeen and twenty-four?—A. Yes. They set the price, I don't. I had a sign in the window for a long time.

Q. Who prepared that for you?—A. He did. He painted the sign in red all over the window, and I took it out and put a small sign out.

Q. Who did that?—A. The fellow that was here, I don't know his name.

Q. You mean the official of Mead's Bakery?—A. Yes, sir, two of them together. One put the sign in the window and show card *ink*, and the other painted the window, and I put a small one in the door. I made the sign myself.

Q. Did they ever tell you the price of bread would go up if they ran Moore out of business?—A. No.

Q. Did they ever tell you how long the price cutting was going to last?—A. I asked them one time, I think. One or two fellows was here, and I think he told me the price was going to be like that until these other fellows got in line with them.

373 Q. What other fellows?—A. The fellows not buying from them.

Q. Then, some of the grocers were not buying?—A. Moise Brothers and Square Deal.

Q. Those three weren't handling Mead's Bread?—A. That's right.

Q. Did Mr. Moore ever say anything to you about signing this petition?—A. No, he never did.

Q. Did he ever ask you to handle his bread alone?—A. No.

Q. A little while ago you said that Mr. Coury said that Mr. Moore said he wanted the cooperation of the local grocers, but you never actually have heard Mr. Moore say anything like that to you.—A. No, he didn't.

Q. Now, this meeting that you attended, it was at the

Medley's Cafe, was that right?—A. Yes, a little room in the back of the Coury store.

Q. Was it a Chamber of Commerce meeting?—A. I don't know.

Q. It wasn't entirely such?—A. The Chamber of Commerce secretary told me to come to the meeting, Zimmerman.

Q. Zimmerman?—A. Yes, but nothing was men-
374 tioned about the Chamber of Commerce calling the meeting.

Q. When they asked you to sign this petition, did they threaten you in any way or bring any pressure on you to sign it?—A. No.

Q. Did they tell you your business would be boycotted if you didn't sign it?—A. No, it was just those two reasons John Coury told me.

Q. He said they wanted the cooperation of local business and to keep this bakery in town.—A. Yes, he said Moore threatened to leave town and to move to Tucumcari, and they wanted the cooperation of all the merchants. And I said, "Sure, I will sign it." I didn't even read the petition.

Q. There were other breads being sold at Santa Rosa besides Mead's and Moore's?—A. Not that I know of. There was some bread that Lilly's used to handle. It was sold for a dime, a cheap bread. But I don't know the name. I know people used to come into my store and show me the bread. They used to bring it from Albuquerque.

Mr. Blythe: I have no further questions.

The Court: Any cross-examination?

375 Mr. Napier: Not now. I believe I want to bring it in later.

The Court: You have cross-examination?

Mr. Napier: I have direct.

The Court: If there is cross-examination, to keep the continuity if nothing else, it should be read now.

Mr. Napier: It will depend on the development of other testimony, Your Honor.

The Court: I think you will waive your right to introduce it, Mr. Napier, if you do not read it now.

Mr. Standley: We offer the cross-examination in evidence of Mr. Hurtado's testimony.

The Court: What are you offering now?

Mr. Standley: The portion of the deposition which we read which was cross-examination in the deposition of Mr. Hurtado.

The Court: It is admitted.

Mr. Blythe: Will counsel for the defendant stipulate Mr. Hurtado was the owner and operator of People's Store at that time?

Mr. Napier: I don't know, Mr. Blythe. I assume he was. He says he was.

Mr. Blythe: If the Court please, we will have to read—

Mr. Standley: May I read that into the record?

376 Mr. Blythe: One of the questions on direct examination to establish Mr. Hurtado's business.

The Court: All right.

Mr. Blythe: Page 39.

Q. Your name is A. M. Hurtado and you live in Santa Rosa, New Mexico?—A. Yes, sir.

Q. Now, Mr. Hurtado, you made a statement the other day—we will shortcut here and eliminate a lot of questions and answers. This is the statement, if you will follow me here, please. "My name is A. M. Hurtado, and I am the owner and operator of the People's Store in the City of Santa Rosa
• • • —A. Yes, sir. • • • "

The Court: You are through with the deposition?

Mr. Blythe: Yes, sir, we are through with it.

The Court: Members of the Jury, we will take a short recess at this time. You may examine that cross-examination and see if you want to offer it.

Court is in recess.

377 Mr. Standley: Your Honor, we offer the deposition of Ernest Valdez taken at Santa Rosa on June 30, 1949.

ERNEST VALDEZ, having been first duly sworn, a witness for the defendant, testified as follows:

Direct Examination by Mr. Napier.

Q. Your name is Ernest Valdez?—A. Yes, sir.

Q. Where do you live?—A. Santa Rosa.

Q. What business are you in?—A. Grocery store.

Q. How long have you been in the business?—A. About a year and a half.

Q. I will ask you whether or not this is correct. "My name is Ernest Valdez and the owner and operator of Ernie's Grocery & Market. I attended a Chamber of Commerce meeting here a few months ago along with Mr. Medley, A. J. Zimmerman, Floy Shaw, L. L. Moore. Soon after the meeting, Bonnie Lucero, John Coury, and Manuel Medley brought a petition to my place of business to sign. The petition was an agreement to quit buying bread from any bakery other than Moore's Bakery. I signed the petition along with other merchants in Santa Rosa." That is correct?—A. Yes, sir.

Q. Mr. Valdez, do you know where this petition is now that you signed?—A. No, sir, I don't.

378 Q. You have said, I believe, it provided that the people signing it should not buy any bread except Moore's, is that right?—A. Yes, sir.

Q. Did it mention any other bakery by name?—A. It mentioned no particular bakery.

Q. It didn't say anything about Mead's Bakery, did it?—A. No, sir.

Q. Now, Mr. Napier put certain words in your mouth regarding getting Meads out of town. Did anybody actually ever say that was the purpose of the petition?

Mr. Napier: We object to this line of testimony, Your Honor, for the reason it has no probative value.

The Court: It does call for the conclusion and as to what they wanted. What is the next question?

Mr. Standley: If the Court please, it is cross-examination.

Mr. Blythe: Your Honor, it does have probative value.

The Court: Well, I cannot rule on questions about a direct-examination which has not been introduced in evidence. I have no knowledge of what the questions were. This cross-examination will be considered as your witness and a part of your case in chief. The answers are not proper as
379 cross-examination when the direct-examination has not been introduced.

Mr. Standley: If the Court please, we will introduce the direct-examination.

Q. It was to get Mead's out of town?—A. Yes, sir.

Q. Was there any other bread here, being sold, other than Mead's or Moore's?—A. I don't think there is, sir.

Q. If there was, you did not know about it?—A. No, sir.

Q. You were in the grocery business?—A. Yes, sir.

Q. No other bakery has called on you selling bread?—A. Yes, sir.

Q. There was another bakery calling on you?—A. Well, at the time there was one from Tucumcari.

Q. He was selling pastry, no bread?—A. Well, very little.

Q. Now, then, at the time of the meeting, who took the lead in the meeting?—A. Well, we all talked a little, you know. Of course, Mr. Zimmerman was the man who called it.

Q. Did he more or less take the lead in the meeting?—A. Yes, sir.

380 Q. Anybody else get up and make any speeches or talks in the meeting?—A. Well, there was several of us talked.

Q. Was Mr. Moore there, L. L. Moore?—A. Yes, sir.

Q. What did he say?—A. He said, he didn't have very much to say.

Q. Do you recall what he did say?—A. No, I can't.

Q. But he did say something?—A. Not that I remember.

Q. You don't remember?—A. No, sir.

Q. Did Moore move from here?—A. No, sir.

Q. He is still here?—A. Yes, sir.

Q. Still in business here?—A. Yes, sir.

Q. In the meeting, did they refer to Mead's bread?—A. Well, not exactly, but they claimed that we needed a bakery here in town, you know, and they got quite a few men from town employed there.

The Court: Counsel understand, I presume, in offering this direct testimony, you are making this man your witness.

381 Mr. Standley: Your Honor, that wasn't what we intended to do.

The Court: Well, that is what you are doing.

Mr. Standley: I realize that. That is the reason I was trying to just get in this cross-examination, which is—.

The Court: It is very difficult to pick out parts of testimony that may be favorable to your side and not give the entire story. You are entitled to give it all if you desire. I just want to caution you in doing so you are making him your witness. Under the ordinary rules of evidence, you are bound by his statements.

Mr. Standley: Your Honor, we will not proceed.

The Court: Nothing further from this deposition?

Mr. Blythe: Just a moment, Your Honor.

The Court: I have ruled you cannot hold consultations after a witness leaves the stand and the attorney leaves the desk. Do you desire anything from this deposition?

Mr. Napier: Yes, sir.

The Court: They have offered a part and you are entitled to offer it all if you desire.

Mr. Napier: Go to page 4.

Q. Mr. Zimmerman called you?—A. Yes, sir.

Q. What did he tell you?—A. Well, he said that Moore was going to Tucumcari, and we should have a bakery, and we needed a bakery here in town, and we ought to fire this Mead's out of town.

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Q. And they had that meeting?—A. Yes, sir.

Q. And that was the purpose of the petition?—A. Yes, sir.

Q. It was to get Mead's out of town?—A. Yes, sir.

Q. Was there any other bread here, being sold other than Mead's or Moore's?—A. I don't think there is, sir.

Q. Now, then, at the time of the meeting, who took the

lead in the meeting?—A. Well, we all talked a little, you know. Of course, Mr. Zimmerman was the man who called it.

Q. Did he more or less take the lead in the meeting?—A. Yes, sir.

Q. Anybody else get up and make any speeches or talks in the meeting?—A. Well, there was several of us talked.

Q. Was Mr. Moore there, L. L. Moore?—A. Yes, sir.

Q. But they were all talking about getting Mead's out of town, that was the purpose of the meeting?—A. Well, the purpose was getting us to buy Moore's bread, to boycott Mead's.

Q. In other words, boycott Mead's and buy Moore's bread, is that right?—A. Yes, sir.

Q. Now, did they tell you what price you had to sell that bread for?—A. Well, all a fellow can make on a loaf of bread is 3 cents.

Q. Is that what they told you?—A. They didn't tell me what I had to sell it for, but that is what I sold it for, 15 and 10 cents.

Q. A pound loaf for a dime and a pound and a half for 15 cents, is that right?—A. Yes, sir.

Q. At the same time, what price were you selling Moore's bread for?—A. Seventeen and twenty-four.

Q. 17 cents for a pound loaf and 24 cents for a pound and a half?—A. Yes, sir.

Q. Now, Moore's wholesale price to you was what?—A. Fourteen and twenty-one.

Q. Did they ever tell you that as soon as Moore's went out of business they were going to raise the price of bread again?—A. No, sir, but they told me whenever these

other merchants take bread that is when they would go up. I mean when Moise's, and Square Deal Market, and Brown's take bread they would go back up.

Mr. Napier: That is all.

The Court: Now, if you desire to offer the cross-examination, you may do so.

Mr. Standley: Yes, sir. Start at the question on the bottom of page 7.

Q. Mr. Valdez, do you know where this petition is now that you signed?—A. No, sir, I don't.

Q. You have said, I believe, it provided that the people signing it should not buy any bread except Moore's, is that right?—A. Yes, sir.

Q. Did it mention any other bakery by name?—A. It mentioned no particular bakery.

Q. It didn't say anything about Mead's Bakery, did it?—A. No, sir?

Mr. Napier: Your Honor, We are emphasizing this all over again to the Jury.

The Court: Mr. Napier, I don't know where he quit. Ordinarily, it wouldn't be proper. He may proceed.

Mr. Napier: Can we read ours a second time to the Jury?

The Court: I understand it is rather awkward.

385 Q. Now, Mr. Napier put certain words in your mouth regarding getting Mead's out of town. Did anybody actually ever say that was the purpose of the petition?—A. Not exactly, but you know when you don't buy from some one, they will have to get out of town.

Q. You know that Mead's is a pretty big outfit?—A. Yes, sir.

Q. It would be a pretty hard job to make them get out of town?—A. That's right.

Q. Was this ever 100 per cent effective? I mean, did they ever get out of town?—A. No, sir.

Q. Did you ever quit handling Mead's bread?—A. No, sir.

Q. As a matter of fact, most of the other stores kept on handling Mead's bread, didn't they?—A. Several of them did, yes, sir.

Q. Did Mr. Moore have anything to do with circulating that petition as far as you know?—A. Not as far as I know.

Q. He just attended this meeting?—A. Yes, sir.

386 Q. It was your understanding it was the desire of local business men to keep a bakery here in town?

Mr. Napier: We object to that, Your Honor; as to what this witness might have intended.

The Court: Sustain the objection.

Mr. Napier: The Jury will be the ones to determine what the purpose was.

The Court: Read the next question.

Mr. Standley: Will you indulge me a second? There is a line of questioning in there on that. On page 10.

Q. Now, you said that there was a Tucumcari bakery being brought in here at that time?—A. No, Albuquerque.

Q. Albuquerque?—A. Let's see. There was Cottage Bakery. He brought mostly pastry and things like that.

Q. Cottage Bakery in Albuquerque?—A. Yes, sir.

Q. This petition applied to them as much as Mead's, *dit* it not?—A. Yes, sir, I guess so.

Q. Did anybody at the meeting say that the purpose of it was to run Mead's out of town, or did they say that they wanted to keep Moore's?—A. Well, they wanted to keep a bakery here in town. In the meeting there they said Mead's wasn't paying no rent here and didn't have but one
387 man employed, and he didn't stay here in town, where Moore's has eight or ten employees and pays rent.

Q. Do you remember when Mead's started cutting prices?—A. No, sir, I don't.

Q. If I refresh your memory, would you say about July, 1948?—A. I don't remember. It was around maybe July, August or September, somewhere around there.

Q. Who told you they were going to cut the prices?—A. Well, let's see, it was a heavy-set fellow from Tucumcari working here. He just come in and sold me bread and told me it was a little lower that day.

Q. Was that the driver of their truck?—A. Yes, sir.

Q. Was his first name Cliff?—A. Yes, sir.

Q. Do you know his last name?—A. No, I don't. He was a kind of heavy-set fellow.

Q. Go ahead and tell us what he said.—A. Well, he just brought the bread in, handed me a ticket, and says, "Bread is a little cheaper today." That's all.

Q. What prices did he give you?—A. Well, usually what you would pay for a loaf of bread is fourteen and twenty-one. It was down to seven and twelve, I think. Or eleven and twelve.

388 Q. To make that a little clearer in the record, you

mean that the wholesale price before they cut it was 14 cents for a pound loaf?—A. Yes, sir.

Q. And 21 cents for a pound and a half loaf?—A. Yes, sir.

Q. And after they cut it, it was 7 cents for a pound loaf and 10 cents for a pound and a half loaf?—A. No, sir, about 11 or 12 cents.

Q. For a pound and a half?—A. Yes, sir.

Q. A pound loaf for a dime and a pound and a half for 15 cents, is that right?—A. Yes, sir.

Q. At the same time, what price were you selling Moore's bread for?—A. Seventeen and twenty-four.

Q. 17 cents for a pound loaf and 24 cents for a pound and a half?—A. Yes, sir.

Q. Now, Moore's wholesale price to you was what?—A. Fourteen and twenty-one.

Q. Did he ever change his prices?—A. No, sir.

Q. How much of Moore's bread were you selling
389 every day on the average before this price cutting started?—A. Well, sir, I can say I was selling about, oh, I would say ten or fifteen loaves a day. That is both pound and pound and a half.

Q. How many did you sell after Mead's cut their prices?—A. Well, I just sold about half, seven or eight loaves. People went after Mead's bread because it was cheaper. Cheaper than you could buy flour and stuff and bake it yourself.

Q. In other words, cheaper than they could make it themselves?—A. I believe it was. I sold a lot of Mead's bread.

Q. Did Mr. Corcoran ever come to your store and talk to you about this?—A. How was that?

Q. Do you know Mr. Corcoran of Mead's Fine Bread Company?—A. Is that the fellow that smokes the cigar?

Q. I don't know.—A. There is two or three men that comes in there.

Q. Well, Mr. Corcoran is from Lubbock?—A. A fellow with—kinda short and heavy?

Q. I don't know Mr. Corcoran. Did any of the officials of the company, as far as you know, ever come in and talk to you about the price of bread?—A. Well, when they went down on the price, they just asked me why I didn't go ahead and take the bread. And what happened—there used to

390 be a nurse in there, used to be a county nurse, she said, "Ernie, if you quit buying Mead's bread I'm going to quit trading with you."

Q. Did she say why?—A. No, she said she liked Mead's bread better.

Q. Was she affected by this cheap price?—A. Well, I don't know.

Q. Now, did Mead's put any signs on your doors or windows regarding the price of bread?—A. Yes, they brought down a cardboard there with the price, pound loaves for a dime and a pound and a half for fifteen.

Q. Isn't it a fact that is the price you have to sell it for?—A. Yes, sir.

Q. Didn't they also paint on your windows in red paint the price of Mead's bread?—A. Yes, sir.

Q. Did they ever tell you they were going to run Moore out of business?—A. No, sir.

Q. Did they ever tell you they were too big an outfit to be kept out of a town like this?—A. Well, they said they wouldn't leave town. They were going to stay right here. They didn't say they were too big of an outfit.

Q. Do you remember when they went back up on
391 their price?—A. Well, it has been a couple of months, I believe, a month or so.

Q. Were these stores you just named handling Mead's bread at the time they went back up?—A. No, sir, I don't think they were.

Q. About how many loaves of Mead's bread were you selling before the price cutting started?—A. Before they cut the prices?

Q. Yes.—A. I was selling about fifteen or twenty loaves, a pound and a pound and a half.

Q. Fifteen and twenty loaves a day?—A. Yes, sir.

Q. Did it increase after they cut the price?—A. Yes, sir.

Q. About how many loaves a day did you sell?—A. About
60 sixty or seventy.

Q. Sixty or seventy loaves a day?—A. Yes, sir.

Q. Now that they have gone up on their price of bread again, how many do you sell?—A. Oh, I sell about, I would say about twenty or thirty loaves.

Q. Has Moore's gone back up again? I mean the
392 number of loaves you sell?—A. Yes, sir.

Q. About how many of his do sell a day now?—A. Oh, around thirty or forty.

Q. Instead of seven or eight?—A. Yes, sir.

Mr. Blythe: That's all.

Mr. Standley: That is all. We offer that part of the deposition.

The Court: It is admitted. Anything further?

Mr. Blythe: The plaintiff rests, Your Honor.

The Court: Ready to proceed for the defendant?

Mr. Napier: The defendant has a motion.

The Court: Members of the Jury, will you retire for a moment until I send for you?

(Jury retires.)

393 Mr. Napier Comes now the defendant, Mead's Fine Bread Company, at the close of the plaintiff's evidence, and moves the Court to instruct a verdict and judgment for the following reasons—Your Honor, I have prepared these so that they will be very succinct and to the point.

The Court: Go ahead.

Mr. Napier: There is no substantial evidence that the defendant was engaged in commerce at any time in question within the meaning of the Act.

There is no substantial evidence that this defendant was acting in the course of commerce, either directly or indirectly, in the sales of goods between different purchasers of any commodity.

That there is no substantial evidence that there was a discrimination in price between different purchasers of commodities of like grade and quality.

That there is no substantial evidence that any of the purchased involved in the alleged commerce were in commerce as required by the Robinson-Patman Act.

That the evidence conclusively shows that the sales complained of by the plaintiff did not have the probable effect, substantially, to lessen competition or tend to create a monopoly in any line of commerce, or injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or the customer of either of them.

394 For the preservation of the point, the evidence shows in this case the sales complained of were made in response to a changed condition affecting the market for, or marketability—.

The Court: I agreed with counsel once on that.

Mr. Napier: That the evidence of the plaintiff conclusively shows that the defendant was justified in selling bread at the reduced price.

The next one; that the plaintiff has failed to show any compensable damage for the reason that up to this point the evidence is that the plaintiff did inflict upon himself the injury complained of.

That the plaintiff's cause of action is by his testimony alone, establishes it to be nothing more than a complaint that this defendant should not be permitted to compete with him on a fair and equal basis.

In connection with this motion—I would like to intercede at this point with this motion—that we have judgment and a directed verdict on the establishment of interstate commerce under paragraph three of the plaintiff's amended complaint insofar as he relies upon common ownership, interlocking directorates, and common management, and common advertising program, and common purchasing arrangements, and common trade name to establish commerce under the provisions of the Act.

The plaintiff has failed to establish by substantial evidence in connection with their claim for damages; first, with reference to loss of profits, the plaintiff has failed to establish by any evidence to any degree of certainty that he would have made a profit on bread at any time about which complaint is here made. That the plaintiff has failed to

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prove by substantial evidence, nor has he proven at all that he has lost or failed to make a profit he would have made in the absence of the sale of Mead's bread at the reduced price. That the plaintiff has failed to establish by substantial evidence facts and circumstances from which the jury could under any stretch of the imagination calculate or guess—and they can't go that far—as to the amount of profits the plaintiff either could have made in the absence of the reduced prices, or what portion of that profit, if he did make such a profit, he had lost.

The plaintiff has failed to establish by any evidence that any injury he might have suffered was proximately caused by any act committed by this defendant which is unlawful.

On the question of loss or damage to the plant, the plaintiff has failed to show damage. His testimony alone proves it was worth as much or more after the bread prices were raised as it was prior to the first day of the boycott.

With reference to probable good will, the plaintiff hasn't shown himself entitled to recover for any loss of good will because he has failed to show wherein good will has been damaged, and no value—and its value after prices were raised at any time has not been shown.

396 The Court: There is some doubt in my mind on this question of profits; as to what the evidence shows. The evidence, as I recall it, according to the plaintiff himself, shows a reasonable expectation of ten per cent of gross sales. The evidence further shows that the gross sales of the plaintiff actually increased even during the period of time when the price was cut. The plaintiff seeks to explain that by a showing he had to put on new routes and incur additional expense, and actually sustained added expenses to the point his profits no longer existed.

Of course, the changed market conditions: on that, I think there is evidence, probably substantial evidence, enough at least at this point in view of the fact that the motion must be construed most strictly against the defendant, to permit the question to go to the Jury.

The motion will be overruled.

There is some question in my mind about that element of profit, gentlemen.

Tell the Jury to come in.

Are you ready to proceed with your evidence now?

Mr. Napier: Yes, Sir.

(Jury returns to the court room.)

(Off the record.)

The Court: You may proceed.

L. L. MOORE resumed the stand.

Direct Examination by Mr. Napier.

397 The Court: You are calling him as an adverse witness?

Mr. Napier: Yes, sir.

Mr. Skarda. May it please the Court, we will object to Mr. Napier displaying these, whatever they are, to the Jury prior to their introduction.

The Court: I presume he proposes to identify these and actually offer them in evidence. Of course, if he doesn't do so, they will be removed from the sight of the Jury.

Q. Mr. Moore, I hand you the balance sheet prepared by you and submitted to the RFC and dated January 31, 1948. Will you please tell us what your cash money you had on that date was as shown by that balance sheet?—A. \$14.49.

Mr. Napier: I tender now to the Court for the conservation of time—and Mr. Moore might very quickly compare this and find out whether it is correct, and eliminate all these questions.

The Court: I haven't seen these placards.

Mr. Napier: Yes, sir.

The Court: Do they merely reproduce what is shown on these statements?

398 Mr. Napier: Yes, sir.

The Court: Isn't that duplication of evidence.

Mr. Napier: The Jury can see this. They can't see this.

The Court: Step down and examine those. Check them and see if they are the same. Have counsel examined these?

Mr. Skarda: No, sir.

Mr. Napier: They examined them yesterday.

Mr. Skarda: We haven't checked them. Did you have an accountant do that, Mr. Napier?

Mr. Napier: They are just copied.

Mr. Skarda: Did an accountant do it? What I want to know is—maybe the figures have been juggled.

Mr. Napier: Let's see if the figures have been juggled.

The Court: If there are mere copies of these matters already in evidence . . .

Mr. Skarda: Your Honor, this is just a copy.

The Court: It is agreed it is a copy?

Mr. Skarda: Yes, sir, I agree it is a copy.

The Court: How about the rest of them, the next one? It would be quicker for counsel to do it than the witness. It is practically the noon hour now. I am going to suggest during the noon hour counsel take these exhibits and check all of them so that at the incoming of the Court after noon you can make
your abatement about them. We just can't take time
399 to compare those details now. Do you have any other questions from this witness?

Mr. Napier: No, sir.

The Court: Call your next witness. You may be excused for the time being.

(Witness excused).

The Court: I suggested that on yesterday.

400 Mr. Napier: Turn to page 18.

(Reading from deposition.)

WOODROW BROWN, witness for the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Napier.

Q. State your name please.—A. Woodrow Brown.

Q. Where do you live?—A. Damned if I know. Santa Rosa, I guess.

Q. Are you in business in Santa Rosa?—A. Yes, sir, Brown's Grocery.

Q. How long have you been in the business?—A. For myself?

Q. Yes, sir.—A. About three years.

Mr. Napier: That's all.

The Court: Any cross-examination of this witness you want to offer?

Mr. Standley: Yes, Your Honor.

Q. You have been in the bread and grocery business over a long period of time, have you not?—A. Yes, sir.

Q. How long?—A. Oh, near *twentieth* years ago.

Q. You were in the bread business during the war?—A. Yes, sir.

401 Q. Shipped bread into Santa Rosa and wholesaled it?—A. Yes, sir.

Q. How did you happen to drop out of that business, Mr. Brown?—A. Well, business just fell off to where I just didn't think it was profitable to stay in it.

Q. How did business happen to fall off?—A. Well, of course, Mr. Moore come back from the Army, and it just didn't look like there was enough for two of them, and it looked to me like I was losing more ground and to justify me to stay in business, and there was other things I had on the string to do and make more out of it.

Q. The people kind of felt like Mr. Moore ought to have the business?—A. Well, I don't know about that. I presume that was their idea.

Q. Since that time you have started Brown's Grocery?—
A. Yes.

Q. You were in business when Mead's—when the makers of Mead's Fine Bread started selling bread here?—A. Yes, sir.

Q. Did you buy bread from them at that time?—A. I did.

Q. When did you stop buying bread from them?—A. Well, the merchants or Chamber of Commerce, I don't
402 know just who it was, got up this petition and wanted to know if we would favor Moore's bread in order to his business here, and I told them I would sign it if the rest of them would.

Q. They had a meeting, didn't they?—A. I don't know whether they did or not.

Q. You didn't attend the meeting?—A. No, sir.

Q. The purpose of the petition was to accomplish what?
A. Well, it was mainly to hold Moore's bakery business here. In other words to keep his help and keep a little more business in town, from what I could understand.

Q. And you have continued to refuse since that date?—

A. Yes, I have up until about two or three weeks ago. I have been buying a little french and whole wheat. I wasn't getting—it seemed it was a little short, and some of them was hollering for it.

Q. Has there been an increase in the bread business in the last year?—A. No, I don't believe there has been a big increase. Business has been up as a whole here in town, for, I would say the last six or seven months.

Q. On a comparative basis do you think more people are buying Moore's bread now than there were buying it in June and July of last year?—A. I don't believe there is.

403 My sales is running pretty close to the same.

Mr. Standley: Now, to cross-examination.

Cross-Examination by Mr. Blythe.

Q. Mr. Brown, it was your understanding, wasn't it, that Mr. Moore was about to take his bakery to Tucumcari?—

A. I believe that that was understood.

Q. And the Chamber of Commerce, of which you are a member, aren't you?—A. Yes, sir.

Q. The Chamber of Commerce wanted to keep his business here, to keep the local payroll and local industry, is that right?

—A. Yes.

Q. Now, was there any pressure brought on you by Mr. Moore to sign that petition?—A. No.

Q. Did anybody threaten you with any harm to your business if you failed to sign it?—A. No. They didn't threaten me with any harm.

Q. Wouldn't you *way* that the pressure brought on you, if any, was merely a matter of an appeal to your patriotism to protect local business from the *enroachment* of a big chain outfit, isn't that right?

404 Mr. Napier: Your Honor, we object to all of that as calling for the conclusion of the witness, what they intended to do. It invades the province of the Jury.

The Court: It is cross-examination. He may answer.

Mr. Napier: It isn't in response to anything brought out in direct examination.

Mr. Standley: The reason for the petition was brought out in direct.

A. Yes and no. It looked to me like I would be a little better profited by it. In other words, that I would make a little more money for myself by staying with Moore's.

Q. How do you explain that?—A. Well, from possibly keeping people that he had employed. Some of them were trading with me. And naturally I would get a little of that, and, of course, if he had moved and taken it out of town why the chances are they might have found work somewhere else. That would remain to be seen.

Q. Did anyone threaten to boycott your business if you didn't quit buying Mead's?—A. No, sir.

Q. As a matter of fact, nobody said anything about Mead's, did they?—A. Not a whole lot.

Q. I mean as an argument for signing this petition, did they say they wanted to run Mead's out of town, or that they wanted to keep Moore's?—A. About the only thing
405 that I know that come direct to me about Mead's is that they were an out-of-town institution, and that they should trade to help Moore being as he was a home-town

merchant. That is about the contents that was ever said to me about Mead's.

Q. Nobody said anything about running Mead's out of town?—A. No.

Q. Was there any particular feeling against Mead's or was it just all out-of-town bakeries?—A. Well, I would say it would be all out-of-town bakeries from the way I understood it.

Q. You used to handle Purity Bread from El Paso, didn't you?—A. Yes, sir.

Q. You were a wholesaler for it?—A. I was.

Q. When did you quit handling their bread?—A. When I bought the grocery store, you might say.

Q. About when was that?—A. Well, let's see. That would be—I have had this grocery about three and a half years, to be exact. This is '49, that would be around about '44 or '45, just right after the war is when I bought the store.

Q. Now, Mr. Napier has asked you about your definition of free competition and the American way of life. I
406 might ask you if you consider it free competition when a small local outfit like Mr. Moore's is bucking up against a big chain outfit like Mead's. I mean, don't you think, that Mead's has some natural advantages from their size of operation.—A. Yes, they have some advantages all right.

Q. And when a big outfit like that cuts prices just in one spot like Santa Rosa and keeps their prices up elsewhere in their territory, do you regard that is free competition?—A. Well, state that again.

Q. Will you read that back to him?

(Reporter reads the question back.)

A. Well, it makes a little bit hard on a small outfit.

Q. As a matter of fact, you have had experience in the wholesale bread business, isn't it common practice to freeze out a local bakery that way?—A. I don't know hardly how to answer that one. I kind of picked that bread business up on the side myself, and I admit I didn't know too much about it.

Q. Being a reasonable and prudent man as Mr. Napier has said, you would recognize the fact that a big chain bakery could freeze out local competition by just cutting prices in

the local area and keeping their prices up elsewhere, so that they could keep up their profits to meet the local losses?—

A. They could do that.

Q. You mentioned you had been handling Mead's
407 whole wheat bread recently. Did you ever tell Mr.

Moore you couldn't get enough of his whole wheat?—

A. Well, no, I didn't Mr. Moore. I asked his driver several times. It seemed like they were a little bit short on flour or something, and I figured I could get enough to fill in the temporary shortage.

Mr. Standley: That is all.

The Court: Any redirect examination.

Mr. Napier: Yes, sir. Page 49.

Mr. Napier: (Reading from deposition of Avaristo Gallegos.)

Q. What is your full name, Mr. Gallegos?—A. Avaristo Gallegos.

Q. You are the operator of what store here?—A. The O.K. Store.

Q. Here in Santa Rosa, New Mexico?—A. That's right.

Q. Mr. Gallegos, did you sign a petition here last year to patronize Moore's bakery?—A. Yes.

Q. Did that petition say anything about Mead's Bakery or any other bakery besides Moore's?—A. I don't recall.

Q. Did you thereafter quit handling Mead's bread?—A. I quit for a while.

408 Q. About how long?—A. Oh, maybe a month.

Mr. Standley: This is a deposition?

Mr. Napier: Yes, sir.

The Court: Any cross-examination?

Mr. Standley: Yes, sir.

(Mr. Standley continues reading direct examination.)

Q. Did you then start handling it again?—A. Yes.

Q. Why did you do that?—A. Because I couldn't sell the other bread.

Q. You couldn't sell Moore's bread?—A. No.

Q. How many loaves of Moore's bread did you sell a day on the average before this petition was circulated?—A. It would be two or three a day.

Q. And afterwards you didn't sell any?—A. Well, yes, very seldom. I sell one or two, mostly I sell Mead's.

Q. I mean after you quit selling Mead's, how many loaves of Moore's did you sell a day?—A. Maybe two or three.

Q. Then you say you started selling Mead's again because—A. Because I didn't sell any bread at all you see.

All the people wanted to buy Mead's because Mead's
409 was selling below.

Q. Were you losing business on account of not handling Mead's?—A. Yes, sir.

Q. Was that because they were selling bread at ten cents a loaf?—A. Yes, sir.

Q. People going to other stores and buying other groceries there, too?—A. Yes.

Q. And you felt you were losing other business besides the bread business?—A. Yes.

Q. There isn't much money in handling bread, is there?—A. No.

Q. Make about three cents a loaf?—A. About.

Q. Now that the price of Mead's bread has gone back up again—A. Yes.

Q. When did that happen?—A. I don't remember.

Q. Just a few weeks ago, wasn't it?—A. About a month. I don't keep no track.

Q. Before they went back up on the price, about how many loaves of Mead's bread were you selling each day?—A. Maybe six or eight.

410 Q. Six or eight loaves a day?—A. Yes.

Q. Now, how many do you sell a day?—A. About eight or ten. What do you mean? When the bread was cheap?

Q. When the bread was cheap, how many loaves of Mead's did you sell?—A. About twenty or twenty-two.

Q. And now you sell about seven or eight?—A. Yes.

Q. Per day?—A. Yes, per day.

Mr. Blythe: That is all.

Cross-Examination by Mr. Napier.

Q. You quit handling bread because of the petition?—A. You mean his bread?

Q. You quit handling bread immediately after you signed that petition?—A. I quit Mead's bread, yes.

Q. That was the reason you quit handling it?—A. Yes.

Mr. Napier: That is all.

Redirect Examination by Mr. Blythe.

Q. Did Mr. Moore have anything to do with circulating this petition as far as you know?—A. Not to my
411 knowledge.

Q. Who brought it around to you to sign?—A. Zimmerman.

Q. Mr. Zimmerman?—A. Yes. Well, he didn't bring the petition to me. He invited me to the meeting at Medley's place. We got the meeting over, and we were talking about it, and they showed the petition, and we signed it there. The purpose of the meeting was to see about the bread business here.

Q. Did they tell you why they wanted you to sign that petition?—A. Yes.

Q. What reason did they give?—A. Well, they said if we signed the petition we'd keep this bread man over here. We have a lot of people employed in the bakery here.

Q. Was anybody trying to hurt Mead's or just wanted to keep the local business here?—A. I don't know. They wanted to keep the local business here, because I understand he got in mind to move to Tucumcari, and they wanted to hold it here.

Mr. Blythe: That is all.

Mr. Standley: That is all.

The Court: Any redirect?

412 Mr. Napier: No, sir. Page 54. The last question.

A. J. ZIMMERMAN.

Direct Examination by Mr. Napier.

Q. You are A. J. Zimmerman and Secretary of the Chamber of Commerce of Santa Rosa, and you are living here?—

A. Fourteen months.

Q. And where did you come from?—A. Directly here?

Q. Yes.—A. From Colorado.

Q. Do you do anything other than act as Secretary of the Chamber of Commerce?—A. No, sir.

Q. You had a part in the meeting held a few months ago regarding the sale of Mead's Bread in Santa Rosa?—A. No, sir, I didn't have any part in it.

Q. Were you instrumental in getting the crowd together?—A. I acted as kind of a chore boy in the matter and called the people together.

Q. Was it a Chamber of Commerce undertaking?—A. No, it wasn't.

Q. Just a meeting of the merchants of the town?—A. Just a few private individuals.

The Court: Any cross-examination?

Mr. Standley: I don't believe so, Your Honor.

The Court: Any further depositions?

413 Mr. Napier: That is all of that. Your Honor, we are ready for Mr. Moore now. If we could have a minute to check some of these, and get some of it done?

The Court: Do that during the noon hour.

Mr. Napier: Well, take the witness stand, Mr. Moore.

L. L. MOORE resumed the stand.

Direct Examination by Mr. Napier.

The Court: You are still calling him as an adverse witness under the rule?

Mr. Napier: Yes, sir.

The Court: Proceed.

Q. Now, Mr. Moore, yesterday you testified with reference

to the completion of the remodeling of your plant at Santa Rosa.—A. Yes, sir.

Q. When was that completed?—A. The last of December in '47.

Q. That was before Mead's Fine Bread Company ever came into town?—A. Yes, sir.

Q. You at that time had this plant that the gentleman spoke of last night?—A. Yes, sir.

Q. And you were then ready to start your operation?—A. Yes, sir.

414 Q. So, beginning with January 1, 1948, you had substantially the same plant from then until the day you closed?—A. Yes, sir.

Q. Now, with reference—we will have to leave that question until we get these other items in. So we will pass on to another. Now, this boycott was an undertaking on the part of the merchants to confer upon you all of the business in town, is that right?—A. It was the merchants willing to cooperate with me to help keep my business in town.

Q. And to do that they wanted to confer upon you all of the business?—A. Well . . .

Q. They wanted you to have all the business without any competition?—A. As much as possible.

Q. Yes.

Mr. Skarda: May it please the Court, isn't all this repetition?

The Court: It was all gone into yesterday with this same witness.

Mr. Napier: Your Honor, this comes up under the defense of mitigation and self-defense of the injury—.

The Court: It was introduced yesterday before the Jury for all purposes. There is no use to go right over the
415 same ground again. It only confuses the Jury and takes the time of the Court.

Mr. Napier: All right.

Q. Did you do anything to stop the boycott?—A. No, I had no part in it whatever.

Q. You made no attempt to get the merchants who were boycotting Mead's—.

Mr. Skarda: Same objection, Your Honor. It is all repetition.

The Court. Proceed, Mr. Napier. It is repetition, but get to the point you are trying to make as quickly as you can.

Mr. Napier: If it please the Court, may I make a statement, sir?

The Court: I have ruled you may proceed.

Q. You made no attempt to get them to accept Mead's bread?—A. I had no part in any of them.

Q. Did you or did you not make any attempt to get your friends or merchants to stop the boycott?—A. I had no part in any of it.

Q. I said—.

Mr. Skarda: If the Court please, the witness answered the question. He said, no.

416 The Court: He said, no.

Mr. Napier: He said he had no part in it.

The Court: He said, no, he had no part of it.

Mr. Napier: I am sorry, I misunderstood you.

Q. You knew you had to have the business from Santa Rosa to exist?—A. Yes, sir.

Q. And you knew your business wouldn't be profitable with Mead's in there on a fair and equal basis?

Mr. Skarda: May it please the Court, it is repetitious.

The Court: I am not sure these questions were asked yesterday. Answer the question.

Q. You knew in January after Mead's got there your business wouldn't be profitable with Mead's in town on a fair basis?—A. Well, the size of the town wasn't large enough for anyone to run in.

Q. But your business would not be profitable with Mead's in town on a fair basis, would it?A. Well, I wouldn't confine it to Mead's.

Q. Well, Mead's or anybody else in town on a fair basis.—A. That wouldn't be considered fair basis when you consider the size of their operation and mine.

Q. They were offering bread back in January and until September 3 at the same price you were offering it.—A. Yes, sir.

Q. Bread was substantially the same in Santa Rosa?
417 —A. Yes, sir.

Q. You were putting out a good loaf of bread?—
A. Yes, sir.

Q. And when Mead's came in there selling bread and offering bread at wholesale at the same price you were offering it.—A. Yes, sir.

Q. —your business wasn't profitable?—A. That's right.

Q. If the merchants had—excuse me just a moment. As I understand your position here, this is a fight between Mead's and the merchants. Is that right.—A. That is my position.

Q. You weren't involved in it at all?—A. No.

Q. The merchants against Mead's, is that right—A. That is my position.

Q. Now, then, if the merchants had stopped the fight at any time Mead's would have raised their prices and come back in town, wouldn't they?—A. I don't know.

Q. You don't know whether they would have done that or not?—A. I don't know.

418 Q. But you don't say they wouldn't have raised their prices?

Mr. Skarda: Objection. The witness answered he did not know.

The Court: He can't testify to what Mead's would or would not have done. Unless he knows. Maybe he has had some *conversations* with them. If he knows what they would or would not do, he can testify.

A. I do not know.

Q. Now, did your losses resulting from that fight, if you suffered any losses, it resulted from that fight between Mead's and the merchants?

Mr. Skarda: Objection. It calls for a conclusion.

The Court: He may state it.

A. From the price cutting, yes, sir.

Q. From the fight between Mead's and the merchants, your losses resulted from that.—A. My losses resulted from the

price cut in bread. However you class the fight, I don't know. But the price cut in bread resulted in my losses.

Q. You said a moment ago the merchants and Mead's were fighting for seven months and 23 days.—A. I said it was my position.

Q. You said it was your position.—A. I didn't have anything to do with the price cut or raise of price or anything.
419

Q. If you sustained any losses resulting from the fight between the merchants and Mead's.—A. It resulted—.

Q. Well, it resulted—.

The Court: Don't argue with the witness. He has answered the question twice. Now, ask the next question without argument.

Q. All right, now, Mr. Moore, you cut the price in Tucumcari on Mead's, didn't you?—A. I reduced the price one or two cents, yes. I forget just what.

Q. When was that?—A. It was I think the last of '49; just before I—no, '50, I mean. Just before I closed up.

Q. And for a month or so.—A. It ran until I closed up.

Q. About how long?—A. I would say a month or so.

Q. About a month or so. Now, did Mead's cut the price of their bread?—A. No.

Q. So any loss you might have sustained, why you sustained it partially at least from the act of cutting the
420 price of your bread, didn't you?—A. Very, very little.

Q. But it amounted to one or two cents a pound, didn't it?—A. Something like that.

Q. That is as far as I can go with this witness until we prove our charts.

The Court: Any further questions from this witness?

Mr. Standley: Your Honor, Mr. Napier isn't through with him. You don't propose to let Mr. Napier do it in parts, do you?

The Court: What is it?

Mr. Standley: Mr. Napier says he isn't through with the witness.

The Court: You are not through with the witness?

Mr. Napier: No, sir. I still have this item to go into.

The Court: Is that all?

Mr. Napier: I believe that will finish me up with this witness.

The Court: Well, you can examine these during the noon hour, and see if you can agree. If you cannot agree, this evidence is already in the record, and I am not going to take the time to permit examination and comparison of the documents. That can be done during the noon hour, if it is
421 to be used at all. In fact, it is only a matter of courtesy that the Court would permit the use of these placards. And counsel for both sides should try and accommodate the Court in trying to conserve time.

Be back at 1:30.

(Noon recess.)

The Court: Call your next witness.

Mr. Napier: We are through with Mr. Moore, Your Honor.

Mr. Skarda: We have some cross-examination.

Cross-Examination by Mr. Skarda.

Q. I have a single question, Mr. Moore, to put to you. On direct examination by Mr. Napier in respect to this question as to whether or not the fight was between Mead's and the merchants who entered into this agreement about giving you 100 per cent cooperation, the fight was confined solely to Mead's and those merchants, and you answered in the affirmative. What was your understanding of the import of the question?—A. I understood—.

Mr. Napier: Your Honor, let's see if he misunderstood the question first.

The Court: Did you misunderstand the question?

A. Yes, sir, I misunderstood the question.

422 The Court: You may clarify it, if you can.

Q. Will you please state what your understanding of the

question was?—A. Understood he was referring to me as an active member in this petition that was circulating; taken a part in starting it, having authority to stop it. I understood he was asking me if I had any part in that petition.

Q. But, now, after understanding the question, what would your answer be to Mr. Napier's question?—A. The question he asked me was whether the fight was between Mead's and the merchants or Mead's and me. And as I said, I misunderstood it. The fight was directly aimed at me due to the effect of the price cutting.

Mr. Skarda: No further questions.

Redirect Examination by Mr. Napier.

Q. Of course, you have just discussed this with your attorney, haven't you?—A. They called my attention to it.

Q. You have discussed it during the noon hour.—A. I said they called my attention to it.

Q. And they discussed the effect of your testimony, didn't they?—A. I said they called my attention to it.

Q. I said they discussed the effect of that testimony?—A. We discussed the testimony.

423 Mr. Napier: Yes, sir. That is all.

(Witness excused.)

MACK MEAD, Resumed the stand.

Direct Examination By Mr. Napier.

Q. Mr. Mead, you testified last night with reference to a figure which was the total sales by the Mead's Fine Bread Company of Clovis at Farwell, Texas. Do you recall that figure?—A. Yes, sir.

Q. What was that figure, sir?—A. Mr. Napier, there were a series of figures broken down into months and periods of time.

Q. From what did you arrive at a figure which represented the total? Total sales by Mead's Fine Bread Company at Clovis in Farwell, Texas?—A. Yes, sir, at one given time.

Q. What was that figure?—A. The figure—.

Mr. Skarda: May I ask what time it was for, first?

Mr. Napier: I beg your pardon. From September 3, 1948, until April 26, 1949.

A. The total sales at Farwell were \$2,302.39.

Q. Now, then, will you please state the total sales of Mead's Fine Bread Company of Clovis, the over-all
424 total sales of Mead's Fine Bread Company of Clovis, for a like period of time?—A. The total sales for a nearly like period of time were \$135,129.

Q. \$135,129?—A. Yes, sir.

Q. All right, sir. What percentage were the sales in Farwell to the total sales during that period of time?—A. If I haven't figured wrong, \$135,129, divided into \$2,302.39 is 1.7 per cent.

Mr. Napier: That is all.

Mr. Blythe: No cross-examination.

(Witness excused.)

Mr. Napier: Defendant rests.

The Court: Defendant rests. Any rebuttal for the plaintiff?

Mr. Blythe: The plaintiff closes, Your Honor.

The Court: You close also, Mr. Napier?

Mr. Napier: Yes, sir.

The Court: All parties close. Are you ready to proceed with the arguments, gentlemen, or do you want a little time?

Mr. Napier: We have a motion.

The Court: You want to make a motion at the close of all the evidence?

425 Mr. Napier: Yes, sir.

The Court: Members of the Jury, you will retire until I send for you.

(Jury retires.)

Mr. Napier: May we, with the agreement of counsel, consider that the motion I made at the close of plaintiff's evidence may be considered as being made at this time?

The Court: It may be considered now as being made after all parties close.

Mr. Napier: And we request the Court—is it improper to prepare it and file it among the papers of this cause?

The Court: It is just dictated into the record. It is not necessary to type it.

Mr. Napier: All right, sir.

The Court: Do you want to add anything?

Mr. Napier: No, sir.

The Court: It covers the same grounds.

Mr. Napier: If the Court please, we would like to argue this damage question and the commerce question.

The Court: I will hear you.

(Off the record.)

(Argument by Mr. Napier.)

The Court: In view of the fact that there is an entire lack of evidence on the counter-claim, I suppose you want to dismiss it.

426 Mr. Napier: Yes, sir, that has been my entire thought all along. We will take a non-suit.

The Court: All right. I need to know that in instructing the Jury.

(Further argument by Mr. Napier.)

(Argument by Mr. Skarda.)

(Further argument by Mr. Napier.)

The Court: Now, on the question of special issues, Mr. Napier.

Mr. Napier: Yes, sir.

The Court: Do you have them?

Mr. Napier: I have some special interrogatories prepared.

(Off the record.)

The Court: Let me have them. Do you have any special interrogatories you want submitted, gentlemen?

Mr. Skarda: No, sir. We are all for the general verdict, Your Honor.

(Off the record.)

The Court: Now, we will pass to this particular motion now pending.

The question of damages insofar as it relates to loss of profits is always a very difficult question to determine; not only to determine, but it is very difficult to prove. It is so easy to go beyond the realm of actual fact and enter into the field of speculation. It is almost impossible when
427 suing for loss of profits to avoid that predicament.

Now, it is quite true in this case the plaintiff himself testified he had never separated the various items of his business; the doughnuts and cakes and pies and bread. He did introduce in evidence—and he did say he didn't know and couldn't testify positively himself as to profit on bread alone. He did testify and there was introduced in evidence his income tax returns showing the business and the amount of profit for previous years. He also testified, if I am not mistaken, that the bread business constituted and was the bulk and the greater part of his business. From his testimony a Jury could—I don't say they will—they might reasonably infer that the cake and pastry business were more or less side lines. And I rather got that impression myself. It might not so impress the jurors that these others items did not constitute his main business. He did testify positively his main business was the bread business.

Now, I don't think it would be speculation and guess work on the part of the Jury to say if this is the main business, and it did show a substantial profit during previous years, I think they can reasonably and largely infer he was making

profits from his bread. Now, that is a matter for the Jury; from all the evidence in the case to make their determination. And as to the amount of profits they have to be guided by all the *testimoney*. I think they could very well from the evidence in this case probably and inferentially determine
428 profits had existed. And if the plaintiff's theory of the case is correct, profits had been lost on account of the price cutting. That is not for me to determine. My only point here is to determine whether there is sufficient evidence for the case to go to the Jury, and let the Jury decide, make its determination.

I think this is peculiarly a case for the determination of the Jury. It is quite true, as counsel has argued, that the direct, positive evidence of lost profits is lacking. But I think it is lacking in every case of this kind. And as it was said by counsel on the Bigelow case, in a price war like this, the greater the offensive, the harder it would be for the defense to prove loss of profits. I think this case ought to go to the Jury. Anyway, I have had a respite from the trial work this week. I am no longer in a hurry. I think counsel ought to argue this case.

Do you want to argue now, or would you like to have a few minutes recess?

And on the commerce question, I think there is ample evidence for the Jury to determine the commerce question. I will submit it to the Jury, and overrule the motion.

Mr. Skarda: We move to dismiss the cross-complaint of the defendant on the ground there has been an utter, absolute failure—.

The Court: It has already been dismissed.

429 Mr. Napier: I announced a non-suit.

The Court: The cross-complaint is dismissed with prejudice.

Mr. Napier: I asked permission of the Court a moment ago to permit us to take a non-suit.

The Court: I think it all ought to be disposed of. I will

not permit you to take a non-suit at this time. I will permit you to dismiss with prejudice. Let you make the motion, if you desire.

Mr. Napier: If the Court will permit us to do that, we would like to have our exception to permission to take a non-suit, and we may have some issues we want the Court to submit to the Jury on that.

The Court: On what?

Mr. Napier: On the cross-action.

The Court: If you want that submitted to the Jury—.

Mr. Napier: I would hate to have to start building up a record. I had anticipated starting trying this case only. I would like to preserve that offset and counter-claim for this defendant.

The Court: I think this case ought to be finally disposed of.

Mr. Napier: I am highly in favor of that, but I want it disposed of my way, if possible.

The Court: I am sure defense counsel would like to have it disposed of their way. What do you want to do on
430 your counter-claim? There may be evidence in the case to sustain a counter-claim. There is certainly evidence of a boycott.

Mr. Napier: We ask permission of the Court to take a non-suit.

The Court: I have denied that.

Mr. Napier: Note our exception. And if we may, we will make an announcement on that in a few moments.

The Court: The only reason I have refused permission to take the non-suit is that all the time I have had in mind the counter-claim, and I have permitted evidence to be introduced on the theory it would go to the Jury; which I wouldn't have permitted if I thought it wouldn't.

Mr. Napier: I believe, Your Honor, all the evidence offered in this case would come in under the grounds of mitigation in our action.

The Court: Well, I don't know. When you examined a witness—and you developed from Moore himself, and others—all along the line of this alleged boycott as a basis of the counter-claim. That testimony was developed by you and was, I supposed, in support of your counter-claim. Such as the deposition Mr. Blythe started to read, and I told him he would be bound by the testimony. And you came along and read the direct-examination which bore directly on your counter-claim.

Mr. Napier: I don't want to put myself in a fractious attitude before the Court. I merely wish to represent
431 the interests of my client, of course. And what I say is in a representative capacity. And I don't want to be cantankerous about a blooming thing. But if there is any possibility through maneuvering here I can preserve that for the future, I intend to do it and would like to do it. And if we may, we will make an announcement with reference to that counter-claim unless the Court wants to go ahead and dismiss it.

The Court: Well, I want to know what you are going to argue to the Jury and what I am going to submit in the way of instructions. I have an instruction prepared on your counter-claim.

Mr. Skarda: The Court understands it has the cross-defendant's motion for dismissal of the cross-complaint before it?

Mr. Napier: While on that subject, Your Honor, we had just as well entertain a motion to dismiss the Mead's Service Company out of this case.

Mr. Skarda: Your Honor, I think the service company ought to be dismissed.

The Court: I don't see anything in here that connects the service company. The motion will be sustained as to the Mead's Service Company.

Mr. Napier: We will make an announcement in a few minutes on the cross-action.

432 (Discussion off the record.)

The Court: Do counsel wish to make any announcement before the Jury comes in?

Mr. Napier: We will submit it to the Jury, Your Honor.

The Court: You will submit the counter-claim?

Mr. Napier: Yes, sir.

The Court: You want an instruction on that?

Mr. Napier: Yes, sir.

The Court: Tell the Jury to come in. You may argue the counter-claim as well as the plaintiff's claim.

Mr. Skarda: You are denying our motion?

The Court: I am denying the motion to dismiss, and also the motion for non-suit.

(Jury returns to the court room.)

(Argument by Mr. Blythe.)

Mr. Napier: I believe that is improper argument. There is no evidence in this lawsuit about a prior course of conduct.

The Court: What did counsel say? I must beg counsel's pardon. I was thinking about my instructions. What was it counsel said?

433 Mr. Napier: I think it best we let it go unsaid. I will withdraw my objection.

The Court: All right, proceed.

(Further argument by Mr. Blythe.)

Mr. Napier: Your Honor, I don't believe that is my thought as to this lawsuit.

The Court: The Jury will recall the evidence, and the Court will instruct as to the law.

(Counsel objected to a reference to the depositions of Mr. Valdez and Mr. Hurtado.)

(Argument by Mr. Houk and Mr. Napier.)

The Court: Court will be in session. The Jury may come in, Mr. Marshall.

(Argument by Mr. Skarda.)

The Court: Members of the Jury, I think, as counsel who have addressed you have spoken about this case being perhaps wearisome and tedious, the Court possibly in the progress of the trial has expressed similar thoughts in trying to speed up counsel in the presentation of the case. The case is an important one. And counsel have not unduly prolonged it. As a matter of fact, I was thinking here as counsel were
434 discussing the case with you, ordinarily a case involving the anti-trust laws of the United States and the price discrimination statutes take much longer than this case has taken. I have known of cases running for weeks and some of them for months. So, I guess we have done pretty well.

Fortunately, the case which was set for trial this morning, which might have taken several days to try, has been, or will be in the morning, otherwise disposed of. It will not be for trial. Nothing else is set for trial this week. So, if there has been any necessity for hurry or rush, that is over.

I never think any lawsuit, even a minor one, should be decided hastily or in a spirit of compulsion to get the case decided and over with. Our duty, yours and mine, is to give that care and consideration in every case that ultimate justice requires.

For these reasons, and in view of the fact that we had a night session last night, I am going to take a recess at this time. And I am going to suggest to the members of the Jury, until you reassemble in the morning, relax and don't ponder too much about the case. You have yet to hear the instructions of the Court. Relax and come back in the morning refreshed

and ready to go to the jury room when it is finally submitted to you to give it that careful thought and consideration which you would like to have if you were in a case of this kind, or any other case for that matter. You will, of course, remember the instructions of the Court. Don't speculate what your decision will be until you have heard the law of the case
435 as given to you by the Court, and the case is finally submitted to you. Be very careful nothing whatever happens; no person talks to you or comments in your presence about the case. Of course, I know no one would do that intentionally, and you would not permit it to be done. But sometimes things happen which actually invalidate a verdict after one has been received. So, you will be very careful nothing happens in any way which would affect your decision in the case, and possibly invalidate a decision after you have reached one.

So, relax and be refreshed in the morning. You may now go. I want counsel to remain a moment.

(Jury leaves the court room.)

The Court: Gentlemen, I am very much puzzled about this counter-claim. No one mentioned it.

Mr. Skarda: I mentioned it, Your Honor. And I have a motion pending to dismiss it.

The Court: I mean in the argument. I don't believe the Jury knows there is a counter-claim, gentlemen.

Mr. Napier: I haven't told them. I kept it a secret.

The Court: Mr. Skarda touched on it indirectly.

Mr. Skarda: I don't see how you can instruct the Jury on it.

Mr. Napier: Why not let us dismiss it and get rid of the thing? This case will probably be disposed of in this trial.

(Discussion between Court and counsel.)

436 Mr. Napier: Judge, let's dismiss it without prejudice.

The Court: I won't permit you to dismiss without prejudice. I will permit you to move to dismiss.

Mr. Napier: But I am afraid of what you will do with it after I move.

The Court: I will not say a word about prejudice.

Mr. Napier: How about a non-suit.

The Court: No. A motion to dismiss.

Mr. Napier: All right, let her go.

Mr. Skarda: You so move?

The Court: The motion to dismiss made by the defendant is sustained. That is all I shall say.

Court will be in recess.

I won't instruct on your counter-claim. Really, if you gentlemen had argued and presented it so that the Jury would have known there was a counterclaim in there—but not a one of you mentioned it.

(Off the record.)

The Court: Court will be in recess. The counter-claim is out.

437 The Court: Members of the jury, I trust you took the Court's advice yesterday evening and rested and refreshed yourselves, and will be able this morning to proceed to the listening of the Court's instructions, and ready to deliberate unwearied and refreshed. Due to my very defective vision, which makes it difficult, as I sometimes say, to read even my own writing, I am giving you the instructions this morning partly written, which will be read to you by Mr. Brayars, the Clerk. But as he reads those you will remember those are the instructions of the Court. They are instructions I have prepared and are the law of the case for your determination. After he has read those, I will comment further orally.

Mr. Bryars, you will read the instructions I have prepared.

Mr. Bryars: (Reading) Members of the Jury, you will now receive the instructions of the Court, and, in the beginning, let me say to you that as you apply the instructions which are the law of the case for the jury you must take into consideration all the instructions and not single out one portion or part, and the same rule applies to the testimony you have heard from the witnesses. It is the duty of a jury to decide a case in accordance with all the testimony which you have heard and in the light of all the instructions of the Court.

The case on trial is one in which the plaintiff Moore brought suit against Mead's Fine Bread Company and the Mead Service Company as defendants. For reasons which are not material to any point which you must determine, the
438 case against the Mead Service Company has been dismissed. You will only consider the issues as between the plaintiff Moore and the defendant Mead's Fine Bread Company, a corporation. The plaintiff's cause of action is based upon the laws of the United States which forbid and frown upon certain transactions involving so-called stifling of competition and tend to monopolistic practices, the substance of which laws I shall now give you at the commencement of these instructions. It is most important that you remember what I now say concerning the laws of the United States which are applicable to the case on trial. I shall not quote those laws exactly but, as I have said, I shall give you the substance of them.

Under the laws of the United States it is unlawful for any person engaged in commerce, and in the course of such commerce, directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, when such commodities are sold for use, or consumption, or resale within the United States, and where the effect of such discrimination may be substantially to lessen competition, or tend to create a monopoly in any line of commerce.

Another law of the United States makes it unlawful for any person engaged in interstate commerce to sell goods in any part of the United States at prices lower than those exacted by said persons elsewhere in the United States for
439 the purpose of destroying competition, or eliminating a competitor in such part of the United States, or to

sell goods at unreasonably low prices for the purpose of destroying competition, or eliminating a competitor. It is further provided by the laws of the United States that anyone injured in his property or business by reason of anything forbidden in the Anti-Trust laws (and the laws I have quoted are within the Anti-Trust Act), may sue and recover the damages sustained. These are the particular laws of the United States which plaintiff claims in his complaint have been violated by the defendants to his damage and injury in the total sum of \$35,000.

The defendants deny the violation of the statutes I have mentioned and deny plaintiff has sustained any damages or injury as a result of any transaction referred to in the pleadings, and about which you have heard evidence.

Upon the issues thus formed by plaintiff's complaint and defendant's answer denying the allegations of the *complaint*, the case is submitted to you, members of the jury, for your determination. The burden of proof rests upon the plaintiff to establish by the preponderance of the evidence the allegations of the complaint. In this regard I instruct you that the plaintiff must establish by the preponderance of the evidence that at the time and place referred to in the complaint, and in the evidence, the defendant Mead's Fine Bread Company was engaged in commerce that is, in interstate commerce. And in that connection I now charge you that in determining whether or not the defendant was engaged in interstate commerce, within the meaning of the laws of the United States, you should weigh and consider all of the evidence introduced. While it must be shown that the defendant was engaged in interstate commerce, it is not important to what extent the defendant was engaged in such commerce so long as it was so engaged as a regular part of its business as distinguished from casual or occasional sales across state lines. You may consider, as evidence that the defendant was engaged in interstate commerce, testimony, if any, of interrelationship of the defendant corporation with Mead's Fine Bread Company of Lubbock, Texas, and other Mead Companies with respect to common stockholders, interlocking directors, common management, common advertising programs, and common purchasing engagements, and all the other evidence which tend to show that the defendant Mead's Fine

Bread Company was or was not engaged in interstate commerce. If you should find from the evidence that the different corporations, about which you have heard testimony, were so interwoven, or intermingled, as to form and effect a single enterprise operation across state lines, then the defendant would be engaged in interstate commerce, and likewise, if you find from the evidence that the defendant Mead's Fine Bread Company, operated a regular scheduled truck line and delivery service between Clovis, New Mexico, and Farwell, Texas, delivering and selling its products manufactured at Clovis, across the state line into the State of Texas, and particularly at Farwell, Texas, and while so engaged the
441 transactions involved in this case at Santa Rosa, New Mexico, occurred, such, together with other *facts* in the case, if you find such facts did exist, would constitute interstate commerce within the meaning of the laws of the United States. But, as I instructed you, the burden of proof rests upon the plaintiff to establish by the preponderance of the evidence that defendant Mead's Fine Bread Company was engaged in interstate commerce during the time the laws of the United States, which I have quoted, were violated, if you find they were violated by the defendant Mead's Fine Bread Company.

Further it is incumbent upon the plaintiff to establish by the preponderance of the evidence in the case that the defendant Mead's Fine Bread Company did at Santa Rosa, New Mexico, at the times disclosed by the evidence and the allegations of the complaint, to wit, September 3, 1948, until April 26, 1949, violate the statutes I have before set forth in these instructions, that is, that at the time and place mentioned the defendant Mead's Fine Bread Company, while engaged in interstate commerce, and in the course of such commerce, either directly or indirectly, discriminated in price between different purchasers of commodities, to wit, bread, were sold, for use, or consumption, or resale, at Santa Rosa, within the United States, and where the effect of such discrimination (to use the language of the statute) may be substantially to lessen competition, or tend to create a monopoly in such line of commerce, or that said defendant Mead's Fine Bread
442 Company, while engaged in interstate commerce, did sell goods, to wit, bread, in any part of the United

States, to wit, Santa Rosa, New Mexico, at prices lower than those exacted by said person, Mead's Fine Bread Company, elsewhere in the United States, for the purpose of destroying competition, or eliminating a competitor in such part of the United States (Santa Rosa, New Mexico), or to sell goods (read) at Santa Rosa, New Mexico, at unreasonably low prices for the purpose of destroying competition, or eliminating a competitor.

Further it is incumbent upon the plaintiff to show by the preponderance of the evidence that he was injured by the unlawful acts of the defendants, if such unlawful acts have been proved to have occurred, and to establish the *damages* he may have sustained by such injury. Such injury and damages must be established by the preponderance of the evidence, however, I shall later instruct you fully on the measure of damages, and shall tell you that even though no actual loss may have been sustained by plaintiff, if all the other elements are present, that is, the violation of the laws of the United States, you should return a verdict for nominal charges. If the matters and things I have just explained to you have been established by the preponderance of the evidence, your verdict shall be in favor of the plaintiff for such sum as you deem him entitled to receive in the light of the instructions on the measure of damages I shall hereafter give you. If, however, it has not been established by the preponderance of the evi-

443 dence that one or more of the laws of the United States, as I have quoted to you, were violated by the defendant Mead's Fine Bread Company, or that the defendant was not engaged in interstate commerce, or did not cut the price of bread at Santa Rosa, and the acts of the defendant, whatever they might have been, were not, either directly or indirectly, to discriminate in price, as I have explained the law to you, or they did not sell goods at Santa Rosa at prices lower than those exacted by them elsewhere in the United States, then, your verdict should be for the defendant.

If you find that the defendant Mead's Fine Bread Company violated the laws of the United States in any of the manners previously outlined—

The Court: That word "any" should not be there. In the

manner as previously outlined to you. I had intended to change that. Now read that again.

Mr. Bryars: If you find Mead's Fine Bread Company violated the laws of the United States in the manner, Your Honor?

The Court: Yes.

Mr. Bryars: In the manner previously outlined, you must next determine whether or not the plaintiff suffered any injury in his business or property by reason of such violations.

In determining damages, if any, you may consider as one of the elements to be taken into consideration plaintiff's lost profits between the period of September 3, 1948, and the time when he discontinued his business in February, 1950.

444 It is simply one of the factors which you may take into consideration in arriving at a determination of the amount of damages you may find and believe from the evidence was sustained by plaintiff to his business and property.

You may further take into consideration as one of the elements of damage, if any, the extent to which the value of plaintiff's property had been diminished as the result of defendant's wrongful acts. There has been evidence as to the value of plaintiff's property on September 3, 1948, and the value on or about February 28, 1950, when plaintiff discontinued his business. The difference in this value may be considered by you as one of the factors in arriving at plaintiff's loss to his business and property.

If you have previously found in favor of the plaintiff but find that he has suffered no damage, then you should return a verdict of nominal damages, that is \$1.00.

The Court: Now, in connection with this question of profits, I think the jury thoroughly understands that profits ought to be determined by the net gain that might reasonably have been anticipated for that period of time; that is, you would have to charge against the gross income of the business all necessary expenses incurred in its operation and its conduct, including the taxes and all those things, and determine the matter of profit upon the net gain. I think you fully understand that.

445 Thus far I have been discussing largely the statutes involved in the case, and the defendant has asked for a special instruction as to those statutes, one in particular, which I am going to give to you. And I will ask Mr. Bryars to read it.

Mr. Bryars: (Reading) In connection with the following issue, you are instructed that the Act of Congress, upon which plaintiff bases his suit renders unlawful price discriminations only where the effect of such discrimination may be substantially to eliminate or lessen competition or create or tend to create a monopoly in any line of commerce.

You are instructed that the Act does not render unlawful every price discrimination, but it does make unlawful price discriminations which have the probable effect of eliminating or lessening competition or tending to create a monopoly. The act is not intended to render unlawful every remote lessening of competition nor does it make unlawful price discriminations having the mere possibility of eliminating or lessening competition or creating or tending to create a monopoly.

The Court: The gist of the statute which has just been referred to is of course, that the effect of the price cutting, if it does exist, must be such it can be said it may cause the lessening of competition or tend to create monopoly. You will observe the words "may be" and also the word "tend" in that statute; which means it doesn't have to actually lessen competition. It is sufficient if the acts are such that there may be
446 a lessening of competition or they would tend to create a monopoly.

Now, as I said a moment ago, thus far I have commented largely about the plaintiff's case and about the statutes involved. Now there is another element of this case on which I want to instruct you, and I am sure you are curious to know, that is, there has been evidence in this case which tends to show that the retail merchants of Santa Rosa prior to September 3, entered into an agreement with the consent and acquiescence of the plaintiff Moore, the effect of which was to give Moore all the business that these dealers and friends had, and wouldn't buy from other people, including Mead's. That has been referred to as a boycott. Under the laws of the United States, and if the proper element of inter-

state commerce is involved, it is a violation of the laws of the United States to enter into a boycott agreement; not only a violation of the laws of the United States but against the policy of the laws of the United States, and incidentally, against the laws of the state of New Mexico. The law frowns on such agreements because they in themselves tend to create monopolies and tend to destroy competition. For that reason it is prohibited by law.

Now in that connection, notwithstanding what I have said to you—and such agreement might well have been a violation of the laws of the United States itself—that agreement and that boycott, if it existed, would not be a defense to the plaintiff's cause of action. That may puzzle you somewhat.

447 There is a definite reason for that. If one person violates the law, it doesn't give another person the right to violate another law of the United States. Two wrongs never make a right. If a person violates one law, such as in this case, if the boycott was actually entered into by the merchants of Santa Rosa, and with the acquiescence and agreement of the plaintiff Moore, the defendant had other remedies than violating the law himself. If you find he did violate the law, other remedies such as injunctions and damage suits and in some cases, criminal actions could be maintained by the defendant, Mead's Fine Bread Company, to protect itself against the violation of the law on the alleged boycott. If that boycott existed, I specifically instruct you, you shall not specifically consider it as a defense to the plaintiff's cause of action.

I suppose you wonder why that evidence about the boycott, if it is no defense. There is a definite reason for that also. While it isn't a defense to the action, I did permit the introduction of the evidence to throw light upon the actions and conduct of the defendant, Mead's Fine Bread Company. You will observe in the first statute mentioned to you the effect of the alleged price discrimination must be to lessen competition or to create a monopoly, not that it actually had to do those things, but such as might have lessened competition or tended to create a monopoly. Now, if the Mead's Fine Bread

448 Company, if its action did not have that effect, that of lessening competition or tending to create a monopoly, but only regaining its own market and reestablished competition, then they would not be guilty of violating that

section of the law. And that was the reason I permitted the introduction of the evidence concerning the alleged boycott, to throw light upon the transaction in its entirety, if it does throw any light, and that is for you to determine.

The other section of the statute has two other conditions in there, and that is another reason I permitted the introduction of this testimony concerning the alleged boycott. You will observe in that section of the statute, just in brief, it is made unlawful for a person engaged in interstate commerce to sell goods at prices in any part of the United States lower than they sell them in any other part of the United States, or at an unreasonably low price. But connected with that are the words "for the purpose of eliminating a competitor or destroying competition". Therefore, if the Mead's Fine Bread Company only engaged in this price cutting for the purpose of regaining its own market or of re-establishing competition and not to destroy competition or to eliminate a competitor, they would not have violated that law and wouldn't be liable in damages. Now that is in so far as the original price cutting was concerned. I want to further instruct you in that regard that although you might believe from the evidence that the

449 action of the Mead's Fine Bread Company was, as I have said under the second statute, solely for the purpose of regaining its own markets and in effect re-establishing competition, which had been perhaps destroyed by the alleged boycott, if that had been its purpose in the first instance, then if they continued the price cutting after their purpose had been achieved, continued it unreasonably to the extent their subsequent action in *con-continuing* the price cutting for a period of several months did amount to a lessening of competition and tending to create a monopoly, or it would be for the purpose of eliminating a competitor, in that instance Moore, or of destroying competition at Santa Rosa, then it would be a violation of the law, notwithstanding in the first instance it might have been solely for the purpose of re-establishing competition and of regaining their own market.

Now, these are matters for you, members of the jury, to determine. I have given you the law. I have tried to make the law simple. Sometimes laws are complicated and we lawyers and judges engage in technical words and phrases. I have

tried to avoid those in these instructions about these statutes in order that you may apply the law to the facts in the case as you have heard them from the witness stand.

Now, of course, you are the sole judges of the facts in the case, and if I have at any time in the progress of the trial or in these instructions indicated in any way whatever what you might think is an expression of opinion on the part of
450 the Court as to the facts in the case, you disregard any such opinion because such has not been my intention, and it is for your determination solely as to what the facts in the case disclose. And apply the law as I have given it to you to those facts.

You are the sole judges of the credibility of the witnesses, that have testified in the case. And in determining the weight and credit you shall give to their testimony you have a right to take into consideration, and you should, their manner and conduct on the witness stand, and, their fairness or unfairness, their reasonableness or unreasonableness or the stories told by them, and their interest in the result of your verdict, if any such appear, and then to give to the testimony of each witness that weight and credit you think it is entitled to receive. If you think any witness has knowingly testified falsely as to any material point of fact in the case, you have a right to disregard all or any portion of the testimony of such witness, unless you believe it to be corroborated by other substantial evidence in the case which you believe to be true.

You have no right to allow your prejudices or *you* sympathies or what may be the effect of your verdict to affect your decision. You are bound by the oath you have taken to *decide* the case solely according to the evidence as you have heard it from the witness stand and the law as given to you in these instructions.

451 I am going to submit two forms of verdict to you.

One will find the issues in favor of the plaintiff, and if you find the issues in his favor, his damages at such sum as you think will reasonably, fairly and justly compensate him for any injury he may have sustained in the light of the measure of damages as previously given to you. The other form of verdict simply finds the issues in favor of the defendant.

When you have retired to your jury room, you will first select your foreman. After you have agreed upon a verdict, your foreman will sign the same and you will return it into open court.

I have overlooked one instruction I usually give in civil cases. I have used the term "preponderance of the evidence". The burden of proof is upon the plaintiff to establish these matters by a preponderance of the evidence. I am sure you know what that means. It simply means that evidence which carries the greater convincing power to your mind. It isn't determined by the number of witnesses that have testified, but that evidence which better satisfies the minds of the jurors.

You may now retire to your jury room to deliberate upon your verdict. Hand the forms to the jury.

(Jury retires.)

The Court: Counsel will now state their objections to the Court's general charge.

452 Mr. Skarda: What is that, Your Honor?

The Court: You must now make your record. State your objections to the Court's general charge immediately.

Mr. Skarda: Comes now the plaintiff—.

The Court: I have given your requested instructions to the reporter and have indicated the refusal on them. It isn't necessary to except to the refusal to give the requested instructions.

Mr. Skarda: —and excepts to the instruction given by the Court to the effect that it is for the jury to determine whether or not the defendant is in interstate commerce, for the reason that the—.

The Court: You do not have to give your reasons, Mr. Skarda. All you have to do is state your exception. Point them out so that if I want to call the jury back and correct them, I can.

Mr. Skarda: Secondly, the plaintiff excepts to the instruction whereby the Court leaves for the Jury's determination the issue as to whether or not there has been a price discrimination.

Third, the plaintiff excepts to the instruction where the Court limited the lost profit to that period from September 3, 1948 until February, 1950.

The Court: I didn't have the wrong date did I? That was the date that he discontinued business?

453 Mr. Skarda: Yes, sir. We contended until the end of the lease under the 20th Century Fox case.

Fourth, the plaintiff excepts to the *protion* of the instruction which permits the jury to use or consider the purpose of the price discrimination.

The Court: I only used that in connection with the second statute, Mr. Skarda, didn't I?

Mr. Skarda: I thought it applied to the whole kit and caboodle, Your Honor. To mean unreasonably low prices.

The Court: To mean unreasonably low prices and selling at lower prices in other parts of the United States.

Mr. Skarda: Your Honor, we except to that, because the purpose—I have to put this in Your Honor to make it clear—it is the purpose of the defendant in making this price discrimination or the use of unreasonably low prices or having different prices for the same product in the United States is totally immaterial; because the intent or animus of the defendant is immaterial; and the prohibition of the statute goes to the act, and the act alone.

And the plaintiff further excepts to the instruction—just a moment please. And the Court erred in instructing that the jury could consider the so-called boycott agreement by the merchants of Santa Rosa in determining whether the purpose of the defendant was to regain its own market and to re-establish its competition in the city of Santa Rosa.

454 The Court: What about the defendant? What instructions do you want to except to, Mr. Napier? As I

say, you don't have to state your reasons, just point out the instruction you except to.

Mr. Napier: Comes now the defendant. At the time provided by the Court and the rules and excepts and objects to the charge of the Court for the following reasons:

The defendant excepts and objects to the submission of this cause to the jury for the reason that the plaintiff has failed to establish—.

The Court: You don't have to state the reason. It takes time. I might want to correct and call the jury back. Just state what your exceptions are.

Mr. Napier: Yes, sir. The plaintiff has failed to establish that the defendant was engaged in commerce at any time in question, and that the purchases involved in discrimination were in commerce, or the commodities involved in such discrimination were of like grade and quality.

The foregoing exceptions are subject to the motion for instructed verdict, and all matters therein pointed out or herein rested upon, none of which defendant wishes to waive.

We object to the portion of the Court's charges, wherein it charges the jury with respect to interstate commerce by reason of the joint ownership and interlocking directorates, for the reason—.

455 The Court: It isn't necessary to give the reason.

Mr. Napier: May I state it for the record?

The Court: It isn't necessary. The rules are very plain. If there is any exception or instruction rather that needs to be corrected, I want to know now so I can call the jury back. That is the purpose of making exceptions now. All you have to do is except to the instruction, number so and so on covering this point, and that is all you have to say.

Mr. Napier: The defendant excepts to the Court's charge that it fails to submit to the jury an instruction and issue on the matter of justification provided for by Section 13 (b) United States Code Annotated, which has been pleaded and proved by the defendant, and in this connection would res-

pectfully request the Court to submit the requested instruction number one.

The defendant excepts and objects to the portion of the Court's charge wherein it instructs the jury on the probable effect—I beg your pardon, we withdraw that. The Court gave that instruction.

Note this one "C". The defendant excepts to that portion of the Court's charge relating to damages for the following reasons—.

The Court: Again, you don't have to give the reason.

Mr. Napier: The charge as made permitted the jury to take into consideration in making its findings the matter of loss of profits, which has neither been pleaded nor
456 proved by the plaintiff. Without waiving the foregoing exception, the charge permits the jury to make a finding of lost profits without first requiring the jury to find whether or not the plaintiff would have made a profit during the period for which recovery may be had. And in this connection the defendant requests the Court to instruct the jury as follows—.

The Court: It is too late to request an instruction now.

Mr. Napier: I believe I have to note it in proper form.

The Court: You do not. If you haven't done so before, it's too late now. And I want the record to show the Court advised counsel early in the progress of this trial to submit all requested instructions in advance of the preparation of the general charge, which wasn't compiled with by defendant's counsel.

Mr. Napier: May the defendant make a statement there, sir?

The Court: Yes, sir.

Mr. Napier: The defendant did not know until the Court read the charge to the jury the manner in which the question of damages would be submitted to the jury.

The Court: I think I did advise counsel on that very point in conference. But go ahead.

Mr. Napier: I am sorry if you did, sir. I didn't—We object to the Court's charge because the Court's charge
457 permits the jury to take into consideration lost profits without having first determined the profits were lost.

That the Court's charge permits the jury to take into consideration the lost profits without having first determined the loss was proximately caused by an act or actions rendered unlawful by the Act.

The Court's charge permits the jury to assess damages directly and proximately caused by the act or acts of the plaintiff.

The Court's charge permits the jury to assess this defendant for damages resulting from acts committed after the date of the commencement of this action.

The Court's charge permits the assessment of damages arising from acts accruing at a date when this defendant wasn't engaged in commerce, and at a time when the purchases involved in such discrimination were not in commerce.

The Court's charge permits the assessment of damages resulting after the defendant raised its prices.

The Court's charge permits the assessment of damages for loss of value of plant in the absence of proof of the value, of the reasonable market value, before and after the alleged wrongful acts of the defendant.

The Court's charge with respect to damages permits the jury to take into consideration the loss of good will in the
absence of substantial evidence of the value of such
458 good will before and after the alleged unlawful acts.

The Court: I excluded good will from my charge.

Mr. Napier: Sir?

The Court: I excluded good will from my charge.

Mr. Napier: Specifically? Well, it is a nullity then.

The court's charge with respect to damages permits the jury to take into consideration matters of loss or injury outside the record of this cause, and permits the jury to speculate

upon matters of loss not recoverable and matters of loss not pleaded or proven.

The Court's charge with respect to damages permits the jury to take into consideration possible loss of profits on items other than bread, and in this the defendant respectfully directs the Court's attention to the testimony of the plaintiff wherein—.

The Court: You don't have to do that Mr. Napier.

Mr. Napier: Sir?

The Court: You don't have to do that.

Mr. Napier: The Court's charge—we get a little eager sometimes—The Court's charge with respect to damages permits the jury to take into consideration lost profits of bread sold by the plaintiff outside of the town of Santa Rosa.

And the Court's charge with respect to damages permits the jury to take into consideration—.

459 The Court: Do you have any other objections except as to damages?

Mr. Napier: Just to the damage question. I think I am just at the end of it.

The Court: All right. Proceed quickly. I am going to call them back and give them one additional instruction. I want to clarify one thing Mr. Skarda raised. I think it is clear, but I want to make it abundantly clear.

Mr. Napier: The Court's charge with respect to damages permits the jury to take into consideration loss accruing from new business engaged in by the plaintiff after and during the time for which recovery is sought.

The Court's charge permits the jury to take into consideration losses which accrued from out of the date prior to December 23rd, 1948 and after April 26th, 1949, and also, and in the alternative, permits them to take into consideration damages by reason of acts prior to December 26th, 1949.

The Court: Tell the jury to come back.

(Jury returns.)

The Court: I have sent for you, members of the jury, because certain objections made by counsel to the Court's charge—I am going to try to clarify a portion or so of it.

I think the matters are fully covered and you understand them clearly, but lest you do not, I want—there are one or two subjects I want to mention further.

460 One of them concerns the instruction I gave you where I referred to the statute which uses the words “for the purpose”. Now, those words only applied to one of the statutes I quoted to you. They applied to that statute which makes it unlawful for a person engaged in interstate commerce to sell its goods at prices lower in one part of the United States than it sells them in other parts of the United States. Or when it sells its goods at unreasonably low prices, then the statute in this regard, and only referring to this statute, says when that is done, either of those things, for the purpose of destroying competition or eliminating a competitor. Now, those words do not appear in the other statutes. And you must not consider what I said about “for the purpose” as applied to the first statute, which makes it unlawful to engage in price discrimination by a person engaged in interstate commerce, and all the other elements where the effect may be to lessen competition or tend to create a monopoly. Now, the words “for the purpose” I used do not apply to this last statute. Under the law, if all the other elements are present, it is sufficient if the price cut is such it may be said it may be lessening competition or tending to create a monopoly, I want you to bear in mind “for the purpose” shall not apply to the second statute.

Now the question has arisen concerning loss of profits. And I did not tell you you must first determine that profits have been lost. I don't remember whether I told you that or not. But of course, you could not ascertain or award
461 damages unless you first determine that there had actually been a loss of profits. So you will first determine from the evidence in the case whether or not the plaintiff did actually lose any profits. Then if you have made that determination, then you will proceed to determine what that loss was in the light of the instruction I gave you. And, of course, your determination as to any loss of profits must

be based on the evidence introduced in the case. You must not go out into the realm of imagination and the field of speculation and guess at any loss of profits. You must determine any loss of profits or any other damages solely from the evidence you have heard from the witness stand, bringing to bear upon that evidence the exercise of common sense and *judgement* as reasonable men and women.

And while I did tell you you could determine the question of loss of profits or question of damages for the period of September 3rd until February 1950, the time plaintiff went out of business, I now instruct you further in this regard that you must always in determining the measure of damages only award such damages as naturally, logically, and reasonably flow as the necessary result from the alleged violation of the law, if any such occurred. I don't think I made this quite clear. I think the objection was right. In determining this loss of profits I might have told you to consider the whole business of the plaintiff; that is, cakes and pies and donuts and pastries and those matters. Now that is
462 eliminated. You must not consider any loss of profits on account of the pastry business because all the evidence as to any alleged price discrimination related only to bread and only to bread sold in Santa Rosa. You can't take into consideration any of the business of the plaintiff, even in the sale of bread outside the city of Santa Rosa, just confine yourselves to the sale of bread in the city of Santa Rosa alone.

As I say, I think you understand those matters thoroughly. I think it is clear. But just to be certain there is no misunderstanding, I have given you these additional instructions.

You may now retire.

(Jury retires)

The Court: I am not going to call the jury back again. You can make *you* exceptions to these last instructions.

Mr. Skarda: The plaintiff excepts to the instruction of the Court last given to the effect that the jury must confine itself in assessing damages the loss affecting the bread busi-

ness, that such is not the law. And it is for the jury to determine what all the consequences of the illegal or unlawful acts of the defendant were. Further, plaintiff excepts to the over emphasis given by the Court in the instructions last mentioned with respect to the determination as to whether or not, first, there had been any loss of profits.

463 The Court: You think I over emphasized that? I didn't raise my voice, did I?

Mr. Skarda: All you had to say was profits, if any.

The Court: What about your exceptions to these instructions, Mr. Napier?

Mr. Napier: In addition to the exceptions previously stated, we except to the Court's charge with respect to damages, and in particular, with reference to loss of profits, in that the Court did not require the jury to first find whether or not the plaintiff would have made a profit from the sale of bread.

The Court: All right. Any thing further from any of you about this case at all?

(Off the record).

The Court: Court will be in recess.

Oral Ruling of the Court, December 8, 1952.

99 The Court: Gentlemen, this case—this is the second time this case has been tried. The plaintiff, or the defendant, takes the position here flatly that there is no substantial evidence to sustain any verdict in any sum whatever. I have thought there might be a possibility of ending this litigation. I think it would be desirable to end it from the standpoint of all the parties.

The defendant has not argued that the verdict is excessive or indicated any willingness to pay any damages in any sum whatever. The Court is further convinced, as stated at the time of the first trial, this is the kind of a case against which the Robinson-Patman Act was passed. The second opinion by the Court of Appeals carries a dissent by Judge

100 Phillips involving the the boycott feature. As I understand that dissent from Judge Phillips, it was the question that gave me considerable trouble throughout the entire trial of this case. But in the instructions given to the Jury in this case I believe the instructions met not only the majority opinion, but also takes care of the trouble that had been given to Judge Phillips, and which also concerned me.

I believe there was substantial evidence in the case. There is no question as to the fact of damages. Of that I am utterly in agreement. This man was damaged and was damaged severely. It may be that the actual proof of damages shows uncertainty, and is indefinite. But that goes only to the amount of the damages, not as to the fact of the damages. And there was substantial evidence in the case as to damages.

The Jury had a right to determine the amount of that damage. No question was raised as to the amount as such. It is only that there should be no such damage at all, and no such allowance of any kind.

And also on the question of interstate commerce, I think the question of interstate commerce is adequately sustained by evidence or on testimony advanced by the plaintiff. And the Jury has passed on that question, even though perhaps it should not have been submitted, as counsel for the plaintiff argued at that time; argued that very likely that question was eliminated from the case by the decision hereto-
101 fore made. But it was submitted to the Jury, and the Jury found for the plaintiff on that issue.

I am not going to disturb the verdict of the Jury in this case. The judgment for the full amount authorized by law will be allowed. That will be three times \$19,000.00. And I believe I said at the former hearing I would allow attorneys' fees of fifteen per cent, did I not?

Mr. Skarda: Of the trebled amount.

The Court: Fifteen per cent of the trebled amount. And inasmuch as this case is undoubtedly going to the Court of Appeals and the Supreme Court of the United States, I am going to increase that amount to twenty percent.

Defendant's Request for Instructions.

471 Comes now Mead's Fine Bread Company, defendant
in the above cause and requests the court to give to the
jury the following instructions:

Defendant's Requested Instruction No. 1.

472 The evidence in this case shows and it is admitted
that all but one of the grocery merchants in the City
of Santa Rosa agreed to and executed an instrument whereby
said merchants agreed among themselves that they would not
purchase bread or other bakery products from anyone except
the plaintiff, Moore. The evidence further shows that all
the merchants, except one, did boycott the defendant Mead's
Fine Bread company by refusing to buy its bread and bakery
products. After the boycott became effective, the defendants,
Mead's Fine Bread Company, reduced the price of bread
only and only in the City of Santa Rosa and sold it at the
reduced price in the City of Santa Rosa from September 3,
1948 to April 26, 1949. No reduction of prices on bakery prod-
ucts other than bread was made by defendant and prices on
bread and other bakery products sold by it outside of Santa
Rosa in competition with the plaintiff remained normal.

Under the federal law of this case, it is unlawful for any
person or corporation engaged in commerce, in the course
of such commerce, either directly or indirectly, to discriminate
in price between different purchasers of commodities of like
grade and quality, where either or any of the purchases in-
volved in such discrimination are in commerce where such
commodities are sold for use, consumption, or resale within
the United States or any Territory thereof or the District of
Columbia or any insular possession or other place under the
jurisdiction of the United States, and where the effect of
such discrimination may be substantially to lessen competi-
tion or tend to create a monopoly in any line of commerce,
or to injure, destroy, or prevent competition with any person
who either grants or knowingly receives the benefit of
473 such discrimination, or with customers of either of
them.

There are exceptions, however, to this rule and under cer-
tain circumstances a person or corporation engaged in com-

merce is justified in selling his or its products at one price in one place and at another price in another place.

In this case it is admitted and has been shown that the defendant Mead's Fine Bread Company, did not lower the price of its bread in Santa Rosa, New Mexico, until after the boycott became effective; and if you find that the defendant sold its bread at the reduced price in good faith solely to break the boycott, your verdict should be in favor of the defendant, because it will have been deemed under the law to have justified the sale of its bread at the reduced price and you will find for the defendant.

Refused.

CARL A. HATCH.

475 Comes now Mead's Fine Bread Company, defendant in the above cause and requests the court to give to the jury the following information:

Defendant's Requested Instruction No. 2.

476 You are instructed that the monopoly of the bakery business in Santa Rosa sought by the merchants for plaintiff's benefit was an unlawful undertaking and profits the plaintiff expected to make from such unlawful undertaking are not recoverable and you will not take them into consideration. You will only take into consideration such profits, if any, the plaintiff might reasonably have expected to derive from the sale of his bread in Santa Rosa in open and fair competition with the defendant's products had the defendant not reduced its prices.

Refused.

CARL A. HATCH.

478 Comes now Mead's Fine Bread Company, defendant in the above cause and requests the court to give to the jury the following instructions:

Defendant's Requested Instruction No. 3.

479 You are instructed that no recovery can be had by plaintiff for losses, if any, he might have sustained

which could have been prevented by him by the exercise of reasonable efforts. You are therefore charged that if you find from a preponderance of the evidence that the defendant would have restored its former prices immediately upon the termination of the monopoly, and that the plaintiff knew or should reasonably have known that the defendant would do so, and if you further find that the plaintiff could, with reasonable effort, have terminated the monopoly, and that he failed to do so, then you will not allow damages for loss of profit after such time as plaintiff could have terminated the monopoly.

Refused.

CARL A. HATCH.

481 Comes now Mead's Fine Bread Company, defendant in the above cause and requests the court to give to the jury the following instructions:

Defendants Requested Instruction No. 6.

482 You are instructed that if you find that the plaintiff failed to conduct his business with reasonable skill and diligence during the time for which the court by its charge permit recovery of damages, if any, you will not take into consideration losses directly and proximately caused by the failure of the plaintiff to conduct his business with reasonable skill and diligence.

Refused.

CARL A. HATCH.

Defendant's Request for Instructions.

484 Comes now Mead's Fine Bread Company, defendant in the above cause and requests the court to give to the jury the following instructions.

Defendant's Requested Instruction No. 7.

485 You are instructed that under the law of this case the plaintiff may not recover for injury or losses solely caused by his own acts and you will not take into consid-

January 2, 1947 through December 18, 1947	\$ 4,423.97
January 5, 1948 through December 14, 1948	19,990.57*
January 18, 1949 through September 27, 1949 . .	17,963.09*

Total—

January 2, 1947 through September 27, 1949. \$42,377.63*

The following is a summary of the annual totals taken from the exhibits attached to the deposition of Rex Webster, which were introduced in evidence at the time of the trial in connection with the reading of the deposition into the evidence.

The following are totals of the amounts billed to Mead's Fine Bread Company, Clovis, New Mexico, by Buckner, Craig & Webster for advertising, including newspaper, radio, theater and outdoor advertising and including mats, art work, and similar services.

April 9, 1947 through December 18, 1947	\$ 2,230.94*
January 20, 1948 through December 31, 1948 . .	7,293.21
February 15, 1949 through July 31, 1949	7,731.27

Total—

April 9, 1947 through July 31, 1949. \$17,255.42*

The following is a summary of the annual totals taken from the exhibits attached to the deposition of Rex Webster, which were introduced in evidence at the time of the trial in connection with the reading of the deposition into the evidence.

The following are totals of the amounts billed to Mead's Fine Bread Company of Big Spring, Big Spring, Texas, by Buckner, Craig & Webster for advertising, including newspaper, radio, theater and outdoor advertising, including mats, art work and similar services.

October 1, 1947 through December 18, 1947	\$ 150.32
January 1, 1948 through December 11, 1948 . . .	9,265.83*
January 18, 1949 through July 31, 1949	9,257.55

Total—

October 1, 1947 through July 31, 1949. \$18,673.70*

The following is a summary of the annual totals taken from the exhibits attached to the deposition of Rex Webster, which were introduced in evidence at the time of the trial in connection with the reading of the deposition into the evidence.

The following are totals of the amounts billed to Mead's Fine Bread Company of Chaves County, Roswell, New Mexico, by Buckner, Craig & Webster for advertising, including newspaper, radio, theater and outdoor advertising and including mats, art work and similar services.

April 17, 1947 through December 18, 1947.....	\$ 1,057.80*
January 20, 1948 through December 13, 1948....	2,843.42
February 27, 1949 through August 20, 1949....	3,837.20

Total—

April 17, 1947 through August 20, 1949.....	\$ 7,738.42*
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The following is a summary of the annual totals taken from the exhibits attached to the deposition of Rex Webster, which were introduced in evidence at the time of the trial in connection with the reading of the deposition into the evidence.

The following are totals of the amounts billed to Mead Baking Company, Hobbs, New Mexico, by Buckner, Craig & Webster for advertising, including newspaper, radio, theater and outdoor advertising, including mats, art work and similar service.

June 7, 1949 through July 31, 1949.....	\$393.99
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[The totals in the stipulation were prepared by counsel for appellant. The stipulation was signed by counsel for appellee subject to verification of the totals by the clerk of the Court of Appeals. The figures, followed by asterisks, after checking with the original record, were changed by the clerk of the Court of Appeals with the approval of counsel.]

Filed in U. S. Court of Appeals, Tenth Circuit, March 27, 1953.

eration in arriving at your verdict such injuries or losses the plaintiff sustained solely caused by his acts.

Refused.

CARL A. HATCH,
HOWARD F. HOUK,
EDWARD W. NAPIER,

Attorneys for Defendant,
MEAD'S FINE BREAD COMPANY,
By EDWARD W. NAPIER.

486 Filed October 10, 1952.

Stipulation With Reference Exhibit 1 to Deposition
of Rex Webster.

1. Comes now the above named Appellant and Appellee and stipulate and agree that the attached summary of totals taken from the exhibits attached to the deposition of Rex Webster, introduced in evidence at the time of the trial in connection with the reading of the deposition into the evidence, may be used in the printing of the record in lieu of the entire exhibit made and introduced in evidence.

* * * * *

MEAD'S FINE BREAD COMPANY, Appellant,
EDWARD W. NAPIER, Attorney for Appellant,
L. L. MOORE, Appellee,
DEE C. BLYTHE, Attorney for Appellee.

The following is a summary of the annual totals taken from the exhibits attached to the deposition of Rex Webster, which were introduced in evidence at the time of the trial in connection with the reading of the deposition into the evidence.

The following are totals of the amounts billed to Mead's Fine Bread Company, Lubbock, Texas, by Buckner, Craig & Webster for advertising, including newspaper, radio, theater and outdoor advertising and including mats, art work and similar services.

[Advertisement from Clovis News-Journal, May 30, 1949.]

A NEW ADDITION

TO THE MEAD FAMILY



A NEW ATTRACTION DRESSED IN GINGHAM

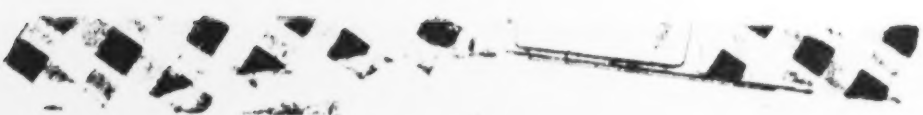
Shades of Grandmother's churn! It's MEAD'S FINE BUTTERMILK BREAD, simply bursting with tangy goodness! The flavor tucked in every generous, extra-thick slice protected by its pert blue gingham wrapper gives it a sell-out bread feature. Go first to your grocer's bread rack; be sure YOU know what thousands of others will find out this week . . . MEAD'S FINE BUTTERMILK BREAD is a butter-rich prize and an extra-delicious treat! Spice up your bread plate with a brand-new loaf, full of old-time nourishment. Blue gingham's the style . . . fresh buttermilk's the star of today's zesty new loaf . . . MEAD'S FINE BUTTERMILK BREAD!

CH 1457

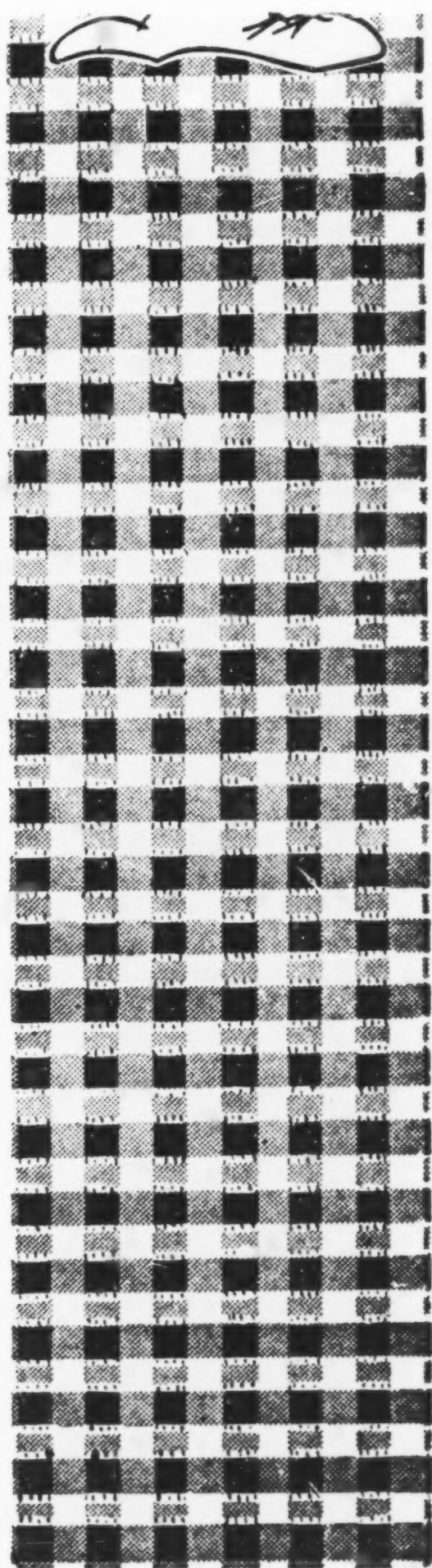
Plaintiff's Exhibit 3

**SLICED
EXTRA
THICK**

Here's the new addition!



**EXTRA
THICK**



**CHURN-FRESH
BUTTER-SMOOTH
COUNTRY-GOOD**

**AN OLD-FASHIONED LOAF
BAKED THE MODERN WAY**

Exhibit 2.

[Advertisement from Albuquerque
Journal, July 26, 1949.]

"TWISTED"
for
finer flavor!




MEAD'S FINE BREAD

Exhibit 4.

[Advertisement from Amarillo Times,
September 15, 1949.]

"Honest-to-Goodness"
**BETTER
BREAD!**



MEAD'S FINE BREAD

Exhibit 5.

[Advertisement from Amarillo Daily
News, September 15, 1949.]

*The TALK
of the
TOWN!*



MEAD'S FINE BREAD

[Advertisement from Lubbock Evening
Journal, March 2, 1948.]

★ IT'S NEW
★ IT'S BETTER
★ IT'S ^{*}*fresher-ized*



★
THE IMPROVED FRESHER-IZED PROCESS MAKES MEADS FINE BREAD
STAY FRESHER LONGER! ★

A NEW ADDITION... TO THE MEAD FAMILY!

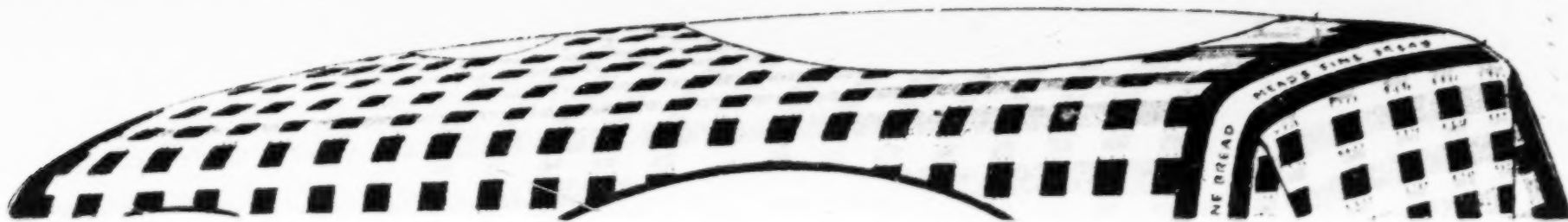


A NEW ATTRACTION DRESSED IN GINGHAM

Shades of Grandmother's churn! It's **MEAD'S FINE BUTTERMILK BREAD**, simply bursting with tangy goodness! The flavor tucked in every generous slice beneath its pert blue gingham wrapper gives it a sell-out bread feature. Go first to your grocer's bread rack; be sure **YOU** know what thousands of others will find out today! **MEAD'S FINE BUTTERMILK BREAD** is a butter-rich prize and an extra-delicious treat for every meal. Spice up your bread plate with a brand-spanking **NEW LOAF** full of old-time nourishment. Blue gingham's the style . . . fresh buttermilk's the star of today's zesty new loaf . . . **MEAD'S FINE BUTTERMILK BREAD!**

SLICED

EXTRA THICK



THICK



- ✓ **CHURN-FRESH**
- ✓ **BUTTER-SMOOTH**
- ✓ **COUNTRY-GOOD**

AN OLD FASHIONED LOAF BAKED THE MODERN WAY

CP-1457
Plaintiffs Ex. No 6
page 2

Here's the new addition



 **NOW IN CARLSBAD!**

THE BEST LOAF OF BREAD IN TOWN

ASK YOUR GROCER FOR



**IT'S NUTRITION IN A
YELLOW WRAPPER**

 **FINER FLAVOR
SMOOTHER TEXTURE**

MEAD'S FINE BREAD STAYS FRESHER LONGER!

**LOOK FOR MEAD'S FINE BREAD BEAUTIES, DRESSED IN YELLOW
ON THE STREETS OF CARLSBAD!**



A SALUTE TO TOMORROW' LEADERS

ca 145
Plaintiffs to 6
page 4

The bulwark of a strong, aggressive community is the leaders it produces through its schools. You who are in the large group of ambitious young men and women preparing for graduation this year are stepping into a promising era of greater responsibility. Upon the wise leadership of those like yourself depends the future of the city, state, and nation. Congratulations on your good work and accomplishments, from the leader in breads . . . Mead's Fine Bread!



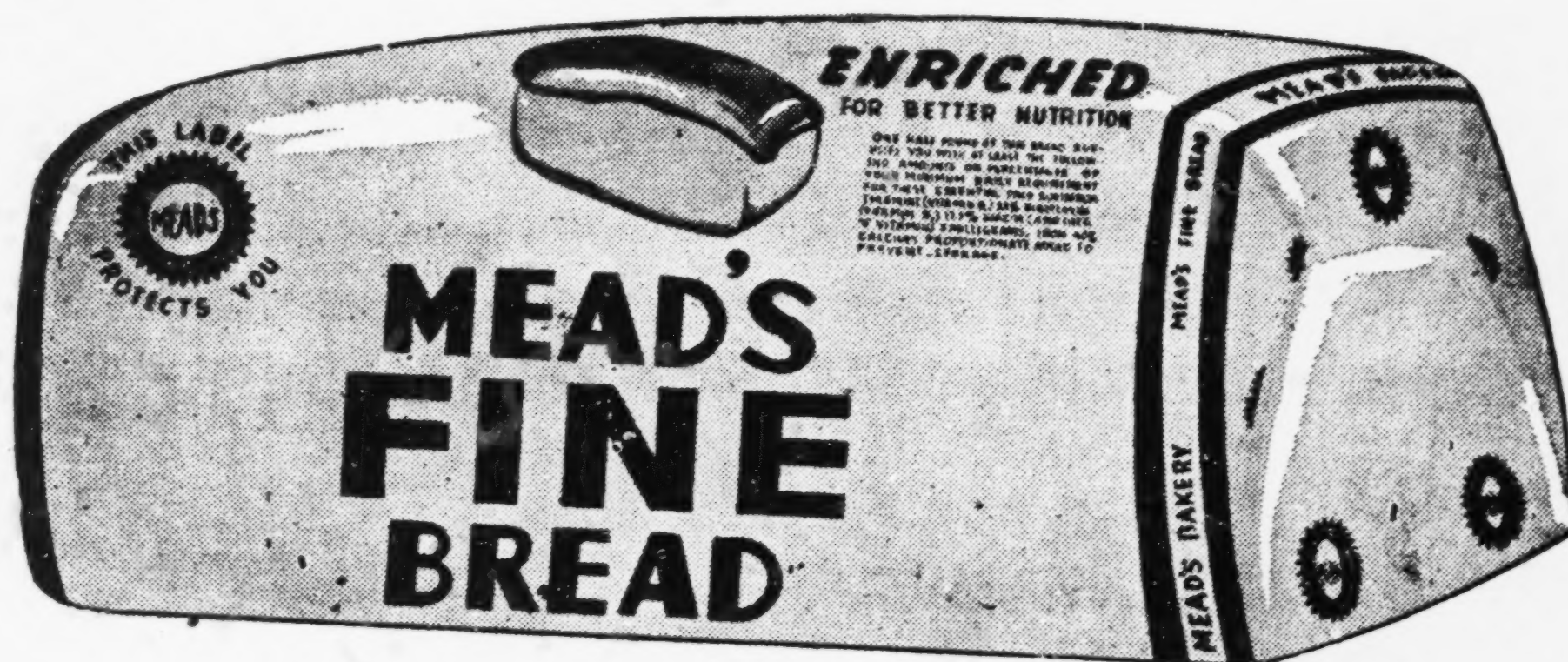
**Fresh-ized*

NOW

DOUBLE WRAPPED

AND WITH

NEW EXCITING VARIETIES



This distinctive new yellow wrapper, with the words MEAD'S FINE BREAD printed in blue and red, is your assurance of bread at its best. Inside this new outer wrapper is an inner wrapper, added for positive protection against atmosphere. This DOUBLE wrapping guards FRESH-ERIZED texture, New Mexico's favorite! Buy MEAD'S FINE BREAD in the distinctive yellow wrapper.

EXTRA! EXTRA! EXTRA!

YOU'LL FIND THESE SPECIALTY BREADS AT YOUR GROCERS

- MEAD'S FINE WHEAT BREAD
- MEAD'S FINE FRENCH BREAD
- MEAD'S FINE THIN SLICED BREAD

ALWAYS CALL FOR

MEAD'S FINE BREAD

EL PAN BLANCO CON EL PAPEL AMARILLO

Introducing...

**MEAD'S
FINE
BREAD**



Family-size
Freshenized

**BIGGER BY HALF...
BETTER BY FAR!**



**THE EXTRA HALF
POUND GOES
FURTHER AROUND
THE FAMILY CIRCLE**

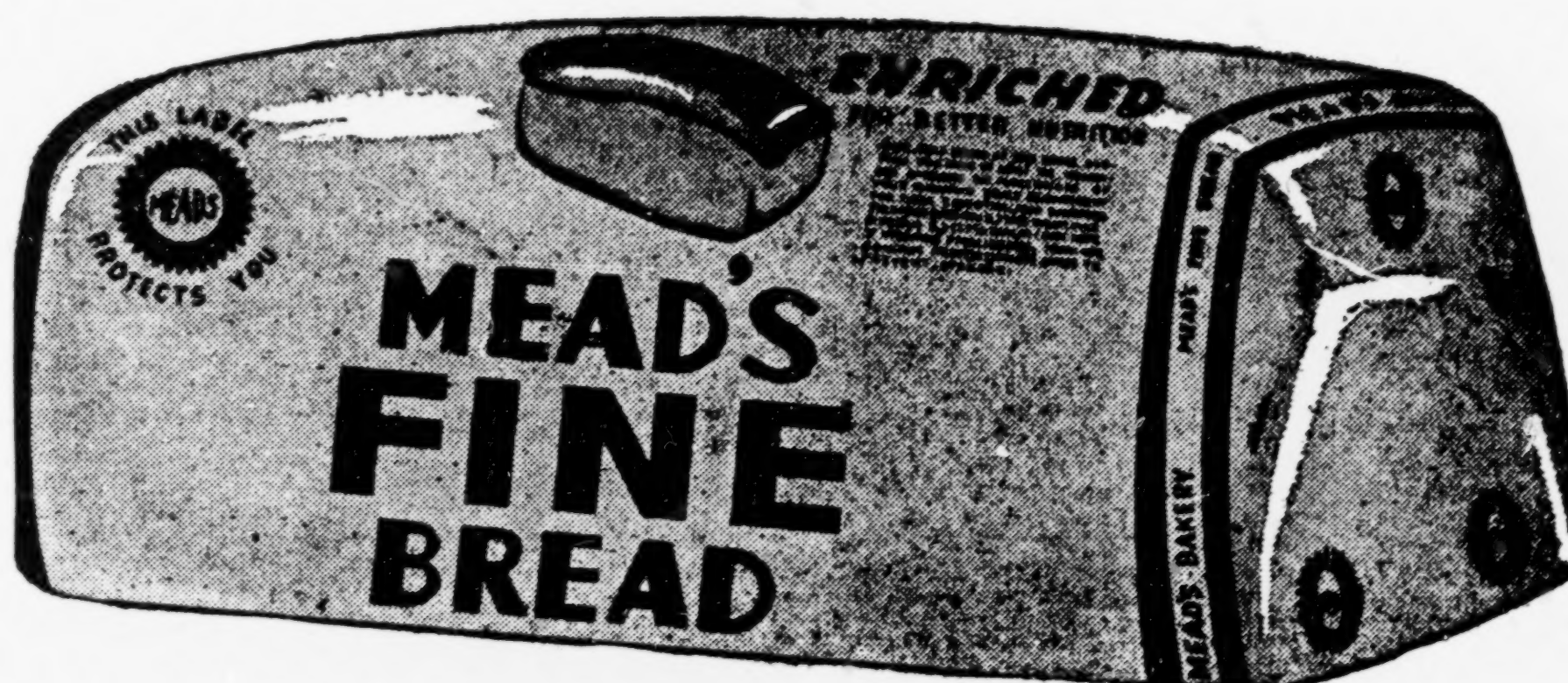
**NOW ON YOUR
GROCERS SHELVES!**

[Advertisement from Hockley County Herald,
December 2, 1948.]

PIGGLY WIGGLY...

WE COMMEND YOU ON THE
OPENING OF YOUR NEWEST
LEVELLAND STORE!

IT'S A FINER PLACE FOR THE FRESHER LOAF!



It's

**Freshen-ized*

YOU'VE MADE A BETTER
WAY TO SHOP FOR
EVERYTHING!

WORTH THE TRIP!



MAY YOUR CHRISTMAS BE MERRY AND THE SEASON BRING YOU JOY

During this happy season of the year, the makers of Mead's Fine Bread hope that you have an abundance of Yuletide joy. Our joy is in serving you . . . our satisfaction is in your generous acceptance of MEAD'S FINE BREAD. Thank you, Saint Nick . . . and thank you, one and all!

BEST OF GOOD WISHES FROM
THE BAKERS OF THAT CHEERFUL LOAF ...



Camera's note:
Pages 275 & 277 are
located in guard hole
frames.

Plaintiff's Exhibit 3.

UNIFORM FLOUR CONTRACT FOR THE BAKING INDUSTRY (Adopted July 5, 1938; Revised April 6, 1943)
Approved by National Federation and American Bakers Association

Contract No.

Dated

HARVEST QUEEN MILL & ELEV. CO., Plainview, Texas, Seller,

AGREES TO
SELL TOMEADS FINE BREAD CO.
C. L. MEAD BUYER.
and BUYER AGREES TO BUY from Seller the following commodities (to be manufactured), on the terms and condition and subject to the agreements stated below and on the back hereof.(Check one) ☐ F.O.B. carries at shipping point, freight charges (basis car load freight rate in effect on date of this contract) to be prepaid or allowed by Seller.
☒ Delivered.

WABOCK BIG SPRING CLOVIS ROSWELL (Specify destination point)

QUANTITY (Cwt.)	COMMODITY (Type of flour or wholewheat, etc.)	CONTAINERS		SELLER'S BRAND or other description	PRICE* (Per Cwt.)
		Size	Kind		
100	Flour	40	FW	OVEN KING	
				PLAIN BULK	5.50
				CLOVIS	5.55
				ROSWELL	5.60
				Burns Pub. Co., Olathe, Kans.	

PRICE INCREASE IN PRICE IN CERTAIN CASES: If the time of shipment herein specified under caption "Shipment" is a longer period than one hundred and twenty (120) days from the date hereof, then in such event the price of flour made from wheat or rye shall be automatically increased one-twelfth (1/12c) cent per cwt. per day commencing on the one hundred and twenty-first (121) day after the date hereof, and continuing until date of shipment within said time fixed herein for final shipment.

SHIPMENT: On directions to be furnished by Buyer shipment is to be made as follows:

120 DAYS

MODE OF PAYMENT: AS HAD

draft with bill of lading attached, through

Bank of

DELIVERY AT DESTINATION:

(Seller shall have the option as to routing except as to delivering carrier)

MODE OF SHIPMENT:

(Specify whether CL, LCL, split car, mixed car, truck, boat or barge)

This contract constitutes the complete agreement between the parties hereto; and cannot be changed in any manner except in writing subscribed by Buyer and Seller or their duly authorized officers. (Conditions cont'd on the back hereof)

This contract is subject to confirmation by the seller at PLAINVIEW, TEXAS.

SELLER

HARVEST QUEEN MILL & ELEVATOR CO., Seller

By

BUYER

By

Confirmed:

HARVEST QUEEN MILL & ELEVATOR CO., Seller

By

Date

NO.

TERMS AND CONDITIONS

(Continued from the Front)

Net Weights: The commodities covered by this contract are sold on the basis of net weights when packed. United States Government moisture standards to govern.

Collections: Where Buyer designates the collecting bank he shall be responsible to Seller for any loss or damage to Seller by reason of any failure or default on the part of said bank in connection with payment by Buyer under this contract.

Taxes: Any and all taxes or exactions, not in effect on the date of this contract, which may, prior to the completion of deliveries hereunder, be levied, imposed or increased by the United States or any state thereof or other Governmental agency on or measured in terms of any of the finished products remaining unshipped and which are to be delivered hereunder, or on or measured in terms of any commodity used in the manufacture of such finished products or the containers therefor or commodities used in the manufacture of such containers, or the processing, purchase, sale, holding for sale, distribution, dealing in, transportation, use or handling of any such products, commodities or containers, if paid or borne by Seller directly or indirectly shall be billed separately to Buyer, where not prohibited by law, and where the determination of the amount of the tax per cwt. or other unit of measure is possible of calculation by the application of any official published conversion rate or otherwise, and shall be paid by Buyer to Seller. Any of such taxes or exactions which the Seller shall be finally relieved from paying or which shall be later refunded or returned to Seller at any time and for any cause shall be refunded or credited to Buyer by Seller as promptly as possible after deduction by Seller of any reasonable expenses incurred in preventing collection of such taxes or exactions or in obtaining or securing such refunds or returns, in making such reimbursement to Buyer, and after paying and discharging all tax liabilities to which Seller may be subjected by reason of its having been relieved from paying such taxes or exactions or having secured such refunds or returns. Seller shall be under no obligation to contest the validity of any such tax or exactions or to prosecute any such claims for refunds or returns.

Shipments: Where the basis of shipment is F.O.B., delivery of goods by Seller to the carrier at point of shipment shall constitute delivery to Buyer, subject to the lien of Seller for the unpaid purchase price. Buyer shall furnish Seller complete shipping instructions (and on sales made on a bulk basis, the necessary containers) at least ten (10) days before the time of shipment. If there is more than one installment of goods shipped or stipulated herein to be shipped, this contract shall be construed to be severable as to each installment, except where such construction would be in direct conflict with the provisions hereinafter set forth under "Rights of Buyer" and "Rights of Seller," and breach or default of either Buyer or Seller as to any installment or installments shall not give the other party a right to cancel this contract, except as herein otherwise expressly provided.

Warranty: Seller expressly warrants that any goods contracted herein will be representative of the brand or grade specified herein to be sold. Buyer hereby waives any claim or defense based on the quality of the commodities specified herein, unless (1) within ten (10) days after Buyer learns by use or otherwise of the defect complained of, but in any event within forty-five (45) days after receipt of notice of arrival of said commodities at destination, Buyer sends Seller at Seller's main office a letter by registered mail specifying the nature of the complaint; and (2) within said forty-five (45) days sends by parcel post or express prepaid to Seller's said office a five (5) pound sample of the goods alleged to be defective or inferior; provided that compliance by Buyer with the above enumerated steps shall not constitute an admission by Seller of the merits or amount of Buyer's claim or defense.

Rights of Buyer: In case of default by Seller (provided that Seller, without limitation, be in "default" if Seller becomes insolvent or is adjudged bankrupt, or if Seller shall fail to make any payment to Buyer when due under this or any other contract between Buyer and Seller, or if at any time the property and assets of Seller are in liquidation, or if Seller's financial responsibility becomes impaired; but that Seller shall not be in "default" for non-performance due to fire, flood, earthquake, tornado, labor difficulties, riot, federal or state laws or regulations, acts or defaults of common carriers, or Act of God or the public enemy), Buyer may (within fourteen (14) days of notice thereof) by written notice sent by registered mail to Seller at Seller's main office:

- 1) cancel the contract; or
- 2) terminate the contract as to the portion thereof in default and purchase within said fourteen (14) days an equal quantity of goods of the same kind and grade and recover from Seller the excess of the price so paid over the purchase price named herein, plus any incidental loss or expense, and in addition thereto, recover a sum equal to one per cent (1%) of the contract price named herein; or
- 3) terminate the contract as to any unshipped balance, and recover from Seller as liquidated damages a sum to be computed by the following formula: (a) one per cent (1%) of the per cwt. contract price named herein multiplied by the number of cwts. remaining unshipped, plus (b) amount of rise, if any, per bushel in the average market price of cash wheat or rye, as the case may be, in carload lots at Seller's mill or basing point (whichever applicable) between date of contract and date of termination multiplied by two and thirty-five hundredths (2.35) times the number of cwts. remaining unshipped. In case of a decline in such price of such wheat or rye between said dates, Buyer shall recover the sum specified in (a), less the amount of such decline per bushel mul-

tiplied by two and thirty-five hundredths (2.35) times the number of cwts. remaining unshipped. Such amount shall be credited to the amount provided in (a) solely in reduction of damages.

Provided: That if the default consists of a failure by Seller to ship at the time required, Buyer may cancel or terminate the contract as above provided only after giving Seller preliminary written notice of intention to cancel or terminate, by registered mail addressed to Seller's main office. If Seller does not ship within eight (8) days after mailing of such notice, then Buyer may, within fourteen (14) days after the expiration of said eight (8) days, cancel or terminate the contract as above provided.

Rights of Seller: In case of default by Buyer (provided that Buyer shall, without limitation, be in "default" if Buyer becomes insolvent or is adjudged bankrupt, or if Buyer shall fail to make any payment to Seller when due under this or any other contract between Buyer and Seller, or if at any time the property and assets of Buyer are in liquidation, or if Buyer's financial responsibility becomes impaired; but that Buyer shall not be in "default" for non-performance due to fire, flood, earthquake, tornado, labor difficulties, riot, federal or state laws or regulations, acts or defaults of common carriers, or Act of God or the public enemy), Seller may (within fourteen (14) days of notice thereof) by written notice sent by registered mail to Buyer at Buyer's main office:

- 1) cancel the contract; or
- 2) terminate the contract as to the portion thereof in default or as to any unshipped balance, or both, and
 - A) resell, within said fourteen (14) days, any of the above goods which have been shipped and which Buyer has wrongfully failed or refused to accept, and recover from Buyer difference between the above purchase price thereof and the price obtained on resale, if latter be less than former; also any incidental loss and expense, including salesman's time and expense in connection with such resale, and all demurrage (resale anywhere in the usual course of Seller's business or at any terminal market or at or near destination shall be proper and conclusive in the absence of bad faith), and
 - B) if Seller terminates as to unshipped balance, recover from Buyer as liquidated damages a sum to be computed by the following formula: (a) one-twelfth (1/12c) cent per day for each day from date of contract to date of termination for each cwt. remaining unshipped, plus (b) ten (10c) cents for each cwt. remaining unshipped as the cost of selling, plus (c) amount of decline, if any, per bushel in the average market price of cash wheat or rye, as the case may be, in carload lots at Seller's mill or basing point (whichever applicable) between date of contract and date of termination multiplied by two and thirty-five hundredths (2.35) times the number of cwts. remaining unshipped. In case of a rise in such price of such wheat or rye between said dates, Seller shall recover the sums specified in (a) and (b), less the amount of such rise per bushel multiplied by two and thirty-five hundredths (2.35) times the number of cwts. remaining unshipped. Such amount shall be credited to the amounts provided in (a) and (b) solely in reduction of damages.

Provided: That if the default consists of a failure by Buyer to provide shipping instructions as required under "Shipments," Seller may cancel or terminate the contract as above provided only after giving Buyer preliminary written notice of intention to cancel or terminate, by registered mail addressed to Buyer's main office. If Buyer does not provide the required shipping instructions within eight (8) days after mailing of such notice, then Seller may, within fourteen (14) days after the expiration of said eight (8) days, cancel or terminate the contract as above provided.

Provision for Automatic Extension: If Buyer shall fail to furnish complete shipping instructions (and necessary containers if sale is made on a bulk basis) to reach Seller at his main office ten (10) days before the date for any shipment specified herein, or before the final date specified for shipment, as the case may be, and if Buyer shall fail to notify Seller that he does not intend to accept any further deliveries under this contract, then (unless Seller elects to exercise his right to cancel or terminate the contract) this contract, as to such shipment, or shipments, shall without notice automatically be extended from day to day until Buyer furnishes complete shipping instructions (and necessary containers if sale is made on a bulk basis) in accordance with the provisions of paragraph entitled "Shipments," or until Buyer notifies Seller that he does not intend to accept any further deliveries under this contract, or until Seller exercises his right provided herein to cancel or terminate the contract; and for each day during which the contract is thus automatically extended Buyer will pay Seller carrying charges at the rate of one-twelfth (1/12c) cent per cwt. per day.

Limitation of Action: No action at law or in equity shall be maintained by Buyer against Seller or any of Seller's other vendees to recover damages for alleged violation by Seller or said vendee of any law, Federal or State, now in effect or hereafter enacted, pertaining to discrimination in price, services or facilities including the Clayton Act (U. S. C. Title 15, Secs. 12 to 27 inclusive) as amended by Act of Congress approved June 19, 1936, or any further amendment thereto, as respects any products delivered by Seller to Buyer pursuant to this contract unless (1) written notice of the particular deliveries on which the claim for such damages is based shall be given by Buyer to Seller at Seller's main office by registered mail within six (6) months after delivery thereof to Buyer with a full statement of the particulars of such claim then known to Buyer, and (2) action shall be commenced within one (1) year after delivery of such products to Buyer.

[Advertisement from Alamogordo News,
March 10, 1949.]

A GREAT LOAF COMES TO ALAMOGORDO!

**MEAD'S
FINE
BREAD**

YELLOW WRAPPER PURE WHITE TEXTURE



Freshen-ized

TO STAY FRESHER LONGER

LIKE BUTTER ON BREAD "MEAD'S" IS BETTER ON BREAD

**MEAD'S FINE BREAD
MEAD'S FINE FRENCH BREAD
MEAD'S FINE THIN-SLICED BREAD
MEAD'S FINE WHEAT BREAD**

[Plaintiff's exhibit 1 is a large chart showing sales.]

Plaintiff's Exhibit 2.

Gross dollar business given instead of bread poundage.
This is done with agreement and consent of Dee C. Blythe,
Attorney for Defendant.

9-18-46 to 9-30-46.....	\$ 35.72
10- 1-46 to 12-31-46.....	439.45
1- 1-47 to 3-31-47.....	551.69
4- 1-47 to 6-30-47.....	788.68
7- 1-47 to 9-30-47.....	1,220.85
10- 1-47 to 12-31-47.....	1,536.70
1- 1-48 to 1-15-48.....	224.50
12-27-48 to 12-31-48.....	84.50
1- 1-49 to 3-31-49.....	1,712.99
4- 1-49 to 4-23-49.....	504.90

BAKERY FLOUR CONTRACT

16-48

Contract No. Plaintiff's Ex # 11 Dated 1-8-48

HARVEST QUEEN MILL & ELEV. CO., Plainview, Texas, Seller,

AGREES TO SELL TO MEADS FINE BREAD CO

of BILL O MEAD BUYER, and BUYER AGREES TO BUY from Seller the following commodities (to be manufactured), on the terms and conditions and subject to the agreements stated below and on the back hereof.

(Check one) ☐ F.O.B. carrier at shipping point, freight charges (basis car load freight rate in effect on date of this contract) to be prepaid or allowed by Seller. ☒ Delivered.

to LUBBOCK, BIG SPRING, ROSWELL (Specify destination point)

QUANTITY (Cwt.)	COMMODITY (Type of flour or wholewheat, etc.)	CONTAINERS		SELLER'S BRAND or other description	PRICE* (Per Cwt.)
		Size	Kind		
5000	FLOUR	100	PAPER	OVEN KING	660
				PLAIN BULK	
				TO CLOVIS & BIG SPRING	662
				TO ROSWELL	665
				Burns Pub. Co., Olathe, Kans.	

*AUTOMATIC INCREASE IN PRICE IN CERTAIN CASES: If the time of shipment herein specified under caption "Time of Shipment" is a longer period than one hundred and twenty (120) days from the date hereof, then in such case on installments of this contract shipped after one hundred and twenty (120) days from the date hereof and prior to the time fixed herein for final shipment under said caption, it is agreed that the basic price above specified per cwt. of flour made from wheat or rye shall be automatically increased one-twelfth (1/12c) cent per cwt. per day, commencing on the one hundred and twenty-first (121) day after the date hereof, and continuing until date of shipment within said time fixed herein for final shipment.

TIME OF SHIPMENT: On directions to be furnished by Buyer shipment is to be made as follows:
120 days

TERMS OF PAYMENT As Inv draft with bill of lading attached, through
Bank of

R. R. DELIVERY AT DESTINATION: (Seller shall have the option as to routing except as to delivering carrier)

BASIS OF SHIPMENT: (Specify whether CL, LCL, split car, mixed car, truck, boat or barge)

This contract constitutes the complete agreement between the parties hereto; and cannot be changed in any manner except in writing subscribed by Buyer and Seller or their duly authorized officers. (Conditions cont'd on the back hereof)
This contract is subject to confirmation by the seller at PLAINVIEW, TEXAS.

SELLER HARVEST QUEEN MILL & ELEVATOR CO., Seller.
By [Signature]

BUYER [Signature]
By [Signature]

Plaintiff's Exhibit 4.

Confirmed: HARVEST QUEEN MILL & ELEVATOR CO., Seller
[Signature] Date 1-8-48

[The reverse side of plaintiff's exhibit 4 "terms and conditions" is identical with the reverse side of plaintiff's exhibit 3.]

Plaintiff's Exhibit 5.

	Bread	Cakes
The Santa Rosa Route was combined with one route in Las Vegas. 6 weeks before boycott the total of both (part of Las Vegas and all of Santa Rosa) was.....	1,285.61	614.84

Six weeks after price increased, total sales for six weeks were	1,649.81	838.80
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[Adding machine tapes, attached to plaintiff's exhibit 5, omitted pursuant to direction of counsel for appellee.]

Defendants' Exhibit A.

Moore's Bakery

Moore's Fine Bread

Box 49

Santa Rosa, New Mexico

April 24, 1947.

Mr. Ross L. Hudson, Manager, Reconstruction Finance Corporation, Railway Exchange Building, Denver, Colorado.

Dear Mr. Hudson: As a way of introduction I will tell you a little about myself, and some of the plans I have for the future.

I am a man thirty-two years old, married and have no children. I have been a baker since 1934. I worked in a number of shops until 1940, when a good friend of mine helped me get started in business for myself here in Santa Rosa. I operated a successful business until 1943 when I went into the Army. I was in the Army (as a baker) for three years. I was released in December 1945, and I reopened my bakery in January 1946.

I have a nice little business now with about 90% of the business in town. One of the largest bakeries in this part of the country tried to come in the other day, but could not make a stop.

Now, the thing I want to do is enlarge, and I need some money to do it in the way that it should be done. For one thing, the quicker I can get started the better.

I have bought enough equipment to completely remodel my shop. I have it all in the building now with the exception of my oven, and it is being made. The next thing I need is new bread pans and a large delivery truck.

Also, there is a small retail bakery in Los Vegas for sale, and I want and need it very much. With that retail shop I could make bread here and truck it there and it would give me the out-let and the volume of business I need. I don't know how much it will take to handle it, but it shouldn't take much. The place is in operation and is doing very good, but the owners want to leave town. Los Vegas is a good town, and a wonderful opportunity for a good progressive bakery. I have been checking it a long time.

At present I owe \$2,300.00 on some of my equipment. I value my entire bakery at \$12,000.00. I need \$5,000.00 to do what I have planned. I want to pay off this note of \$2,300.00 and use the rest in this shop in Los Vegas, and to complete my shop here.

Last year my gross income was \$37,400.00 and a net of \$7,000.00. I had a lot of extra expense getting my business reestablished. This year I will do much better.

I have a brother baking for me now, and in the future he plans to buy into my business. However, I would accept a note from him as half interest in the business, if his name would help me obtain a loan from you. That way, if something should happen to me, he could carry the business on. He was in the Navy for four years, as a baker.

I have talked to the First National Bank here, and the First National Bank in Albuquerque, and neither of them are interested in making me the loan.

I would like to come and talk with you, but first I would like to know the information you will want me to bring, and when would be the best time to contact you. Please give this letter your immediate attention, as I need to know as soon as possible.

Very truly yours,

MOORE'S BAKERY,
By L. L. MOORE.

Defendants' Exhibit B.

To be used only by NONSUPERVISED LENDER for making application for guaranty of a loan to be made. Make out in duplicate, original to be forwarded to the Veterans Administration, Loan Guaranty Division, duplicate to be retained by the lender. DO NOT USE TO REPORT A FARM OR HOME LOAN.

APPLICATION FOR BUSINESS LOAN GUARANTY			VA LOAN No.	
FULL NAME OF VETERAN (Last, first, middle) Moore, Linton, L.			L.S. May 4, 1914 SERIAL NO. 36 369 897	
ADDRESS (Street, city, zone, State) Box 15 Santa Rosa, New Mexico			BRANCH OF SERVICE <input checked="" type="checkbox"/> ARMY <input type="checkbox"/> MARINE <input type="checkbox"/> NAVY <input type="checkbox"/> COAST GUARD	
DATE OF ENTRANCE ON ACTIVE DUTY Jan. 10, 1943	DATE OF SEPARATION FROM ACTIVE DUTY Dec. 17, 1945	RANK AND ORGANIZATION AT TIME OF SEPARATION Technician 5th Grade Hq. Co. Shore Bat. Engineer	REASON FOR SEPARATION Honorable Discharge	
<p>1. The undersigned veteran hereby applies to the undersigned lender for a loan for the purposes stated herein, and both hereby apply to the Administrator of Veterans' Affairs for Guaranty of said loan under Title III of the Servicemen's Readjustment Act of 1944, as amended, Public 268, 79th Congress, and severally agree that the Regulations issued under the act, and in effect on the date of any loan which is submitted and accepted or approved for a guaranty thereunder shall govern the rights, duties, and liabilities of the parties to such loan and any provisions of the loan instruments, inconsistent with such regulations are hereby amended and supplemented to conform thereto (Section 4534 of the Regulations)</p> <p style="text-align: right;">Date May 16, 1946, 19__</p>				
<p>2. THE LOAN IS BEING MADE PURSUANT TO SECTION 503 FOR THE FOLLOWING PURPOSES: to purchase new equipment; to take up indebtedness on presently owned equipment; to retire note at bank; working capital.</p> <p>(If loan is closed pursuant to Section 507 for refinancing delinquent indebtedness, this application must be supplemented with VA Form No. 1088 Loan Report Delinquent Indebtedness)</p>				
PURCHASE OR CONSTRUCTION COST			COST OF <input type="checkbox"/> REPAIRS <input type="checkbox"/> ALTERATIONS <input type="checkbox"/> IMPROVEMENTS	
REALTY	PERSONALTY	TOTAL	REALTY	PERSONALTY
	10,000.00	10,000.00		
3. FOR WORKING CAPITAL			GUARANTY REQUESTED	
AMOUNT OF LOAN 10,000.00			2,000.00	
4. BORROWER'S PRESENT OR PROSPECTIVE INTEREST IN THE REALTY TO BE ACQUIRED OR IMPROVED: <input type="checkbox"/> FEE SIMPLE <input type="checkbox"/> OTHER _____				
<input type="checkbox"/> LEASEHOLD, EXPIRING _____ 19__ <input type="checkbox"/> GROUND RENT, \$ _____ PER ANNUM				
5. LOCATION OF REAL PROPERTY TO SECURE THE LOAN: (Street, number—If rural, R. F. D. highway number, name of farm, name of nearest town, miles and direction from that point)				
6. LEGAL DESCRIPTION OF REAL PROPERTY AS IT WILL APPEAR IN THE MORTGAGE OR OTHER INSTRUMENT SECURING THE LOAN. IF PERSONAL PROPERTY, FULLY DESCRIBE BY SERIAL NUMBERS, TRADE NAME OR OTHERWISE, IF AVAILABLE (Use additional sheet, if necessary)				
Bakery equipment now owned totaling \$13,460.00				
Bakery equipment to be acquired totaling \$5,602.63				
7. I FURTHER DECLARE THAT:				
(A) I DO NOT HAVE AN APPLICATION PENDING FOR A LOAN FOR THE PURPOSES STATED HEREIN.				
(B) I PREVIOUSLY HAVE USED MY GUARANTY BENEFIT FOR OTHER LOAN OR LOANS AS FOLLOWS: _____ FOR REAL ESTATE; _____ FOR NON-REAL ESTATE.				
/s/ LINTON L. MOORE (SIGNATURE OF VETERAN)				
8. ALL THE INFORMATION REFLECTED BY THIS APPLICATION IS TRUE TO THE BEST OF THE LENDER'S INFORMATION AND BELIEF.				
Attest _____ (SECRETARY)				
CORPORATE SEAL (Only if required by State law)				
CONFIRMED COPY				
FEDERAL STATUTES PROVIDE SEVERE PENALTIES FOR ANY FRAUD, INTENTIONAL MISREPRESENTATION OR CRIMINAL CONVICTION OR CONSPIRACY PURPOSES TO INFLUENCE THE ISSUANCE OF ANY GUARANTY BY THE ADMINISTRATOR HEREUNDER.				

BUSINESS EXPERIENCE AND PLANS OF VETERAN APPLICANT

9. STATE YOUR QUALIFICATIONS AND EXPERIENCE TO OPERATE THE BUSINESS FOR WHICH THIS LOAN IS REQUESTED

15 years experience in bakery business

NOTE.—Fill out items Nos. 10, 11, 12, 13, and 14 if loan is to acquire an existing business or in connection with a business presently operated by the applicant.

10. FINANCIAL STATEMENT OF BUSINESS TO BE ACQUIRED OR OF PRESENT BUSINESS OPERATED BY APPLICANT AS OF _____, 19__

Fill in all blanks using "none" if appropriate.

Cash on hand and in bank.....	\$ 655.00
Accounts receivable.....	144.00
Merchandise, supplies, or other inventory.....	1450.00
Total.....	\$5,000.00
Land and buildings.....	
Fixtures, machinery, tools, equipment, or other fixed assets.....	13,410.00
Life insurance—Cash surrender value (net).....	
Good will 1941 Plymouth convertible.....	450.00
Prepaid expense.....	
Other assets.....	
Total.....	\$7,260.00

Notes payable to banks.....	1000.00
Notes, conditional sales contracts, chattel mortgages, or other obligations due within 1 year.....	\$2200.00
Accounts payable.....	655.00
Income or other taxes.....	
Total.....	\$3855.00
All liabilities due after 1 year (mtg. on R. E. <input type="checkbox"/> chattel mtg. <input type="checkbox"/> cond. sales contract <input type="checkbox"/> other (describe) <input type="checkbox"/>	
Reserve accounts.....	
Total all liabilities.....	\$
Net worth.....	13,410.00
Total.....	\$17,265.00

11. Are you a co-maker, endorser, or guarantor on any obligation? ☐ Yes ☒ No. If yes, describe _____

12. Condensed Statement of Sales, Profits, or Loss

This year to date <u>1/1/47 to 5/15/47</u>	Last year <u>1/1/46 to 1/1, 1947</u>
(a) Gross sales.....	\$33,535.00
(b) Cost of goods sold.....	6,767.50
(c) Operating expenses (total)*.....	3,383.75
(d) Depreciation.....	650.00
(e) Net profit or loss before owner's withdrawals.....	2,733.75
(f) Total withdrawn by owner.....	650.00
	*Do not include personal income taxes.

13. Give name and address of three credit references:

Charles Ilfeld Co., Las Vegas, New Mexico
Harvest, Seed Mills & Elevator Co., Plainview, Texas
General Mills Inc., Amarillo, Texas

NOTE.—Fill out items Nos. 14 and 15 only when loan is for the purpose of establishing a new business.

14. PERSONAL AND FINANCIAL STATUS OF BORROWER:

(A) OCCUPATION Bakery	(P) NAME OF SPOUSE S. Lucile Moore
(B) EMPLOYED BY (Name and address) self	(G) OCCUPATION OF SPOUSE school teacher
(C) INCOME PER YEAR, 7,000.00	(H) INCOME OF SPOUSE PER YEAR 2,500.00
SALARY \$ _____ OTHER \$ _____	SALARY \$ _____ OTHER \$ none
(D) MARITAL STATUS <input checked="" type="checkbox"/> MARRIED <input type="checkbox"/> SINGLE	(I) EMPLOYED BY (Name and address) Santa Rosa High School
(E) NUMBER OF DEPENDENTS wife	(Economic teacher)
AGES 31, no children	

15. VETERAN'S ESTIMATED INCOME AND EXPENSE FOR THE NEXT 12 MONTHS

(If purpose of loan is to establish a new business)

I. INCOME		II. EXPENSE	
(A) FROM SALES OF GOODS AND SERVICES	\$55,000.00	(A) TOTAL ESTIMATED INCOME FROM COL. I	\$ 55,000.00
(B) COMPENSATION OR PENSION FROM GOVT.	-0-	(B) COST OF GOODS AND SERVICES SOLD	22,500.00
(C) OTHER	-0-	(C) OPERATING EXPENSES	11,250.00
TOTAL	\$55,000.00	(D) INCOME AND OTHER TAXES	1,300.00
(D) SPECIFY SOURCE OF OTHER INCOME (Column (c))		(E) PAYMENTS ON LOANS	2,000.00
		(F) OTHER BUSINESS EXPENSE	500.00
		(G) EXCESS OF ALL INCOME OVER TOTAL BUSINESS EXPENSE	17,150.00
		(H) ESTIMATED PERSONAL AND LIVING EXPENSE	1,800.00

OPERATING AND PROFIT AND LOSS STATEMENT OF

Moore's Bakery
(Sole Proprietorship)

For period from Feb. 1, 1947 to Jan. 31, 1948

FINAL DATE TO COINCIDE WITH ACCOMPANYING BALANCE SHEET

1. Net Sales.....	47,742.63
2. Cost of Goods Sold *.....	39,945.80
3. Gross Profit on Sales.....	7,796.83
4. Selling Expense *.....	3,410.18
5. Administrative and General Expense *.....	548.29
6. TOTAL EXPENSE (line 4 plus line 5).....	3,958.47
7. Operating Profit or Loss (line 3 less line 6).....	3,838.36
8. Add Other Income *.....	94.97
9. TOTAL OF LINES 7 AND 8.....	3,933.33
Deduct Other Expense:	
10. Interest Expense.....	141.66
11. Loss on Bad Debts.....	
12. Taxes (Other Than Federal and State Income Taxes).....	450.91
13. Other Expenses (itemize below).....	
14.	
15.	
16.	
17.	
18.	
19.	
20.	
21.	
22. TOTAL OF LINES 10 TO 21, INCLUSIVE.....	592.57
23. PROFIT OR LOSS BEFORE DEPRECIATION, ETC. (line 9 less line 22).....	3,340.76
Less:	
24. Depreciation.....	1,788.22
25. Depletion.....	
26. Federal and State Income Taxes *.....	
27. TOTAL OF LINES 24, 25, AND 26.....	1,788.22
28. NET PROFIT OR LOSS (line 23 less line 27).....	1,552.54

ANALYSIS OF SURPLUS

29. TOTAL SURPLUS AT BEGINNING OF PERIOD.....	
30. Net Profit or Loss for Period.....	
31. Line 29 Plus Line 30, if Profit; Line 29 Minus Line 30, if Loss.....	
Add:	
32. Surplus Paid in During Period.....	
33. Surplus Resulting From Revaluation of Assets.....	
34. Other Additions to Surplus.....	
35. TOTAL OF LINES 31 TO 34, INCLUSIVE.....	
Deduct:	
36. Dividends.....	
37. Other Charges to Surplus.....	
38. TOTAL OF LINES 36 AND 37.....	
39. Surplus at End of Period (line 35 less line 38); Must Agree With Surplus as Shown in Balance Sheet.....	

* Give details on separate legal size sheet, with annual and semiannual statements only.

The above is a true statement of operations of this Proprietorship to the best of my knowledge and belief.
(Corporation, Company, etc.)

L. L. Moore

Per Katherine Campbell
Bookkeeper

Moore's Bakery
Santa Rosa, N. M.

2. Cost of Goods Sold

Materials

Inventories, 2/1/47

Food	\$ 1005.85	
Supplies	483.08	\$ 1488.93
Purchases - Food	\$25577.65	
- Supplies	3342.36	
Freight In	<u>231.32</u>	<u>29151.33</u>
		<u>\$30640.26</u>

Less Inventories 1/31/48

Food	\$ 986.36	
Supplies	<u>1115.41</u>	<u>2101.77</u>
<u>Cost of Materials</u>		

\$28538.49

Labor

8247.77

Overhead

Rent	\$ 655.00	
Repairs and Maint. - Bldg.	573.65	
" " - Equip.	83.75	
" " - Furn. & Fix.	45.00	
Insurance Expense	96.53	
Laundry Expense	103.53	
Utilities	997.94	
Tel. & Tel.	141.98	
Misc. Exp.	<u>462.16</u>	<u>3159.54</u>

Cost of Goods Sold

\$39945.80

4. Selling Expense

Wages	\$ 2600.00
Delivery Expense	431.69
Repairs and Maint. - Truck	378.49
<u>Total Selling Expense</u>	<u>\$ 3410.18</u>

5. Administrative and General Expense

Advertising	\$ 285.63
Office Expense	37.91
Memberships & Dues	27.50
Travel & Entertainment	86.00
Bookkeeping Service	111.25
<u>Total Administrative and General Expense</u>	<u>\$ 548.29</u>

R. F. C. Form L-572
(Revised)
12-19-38Form approved.
Budget Bureau No. 41-R164-42Balance Sheet of Moore's Bakery
(~~Moore's Bakery~~ sole proprietorship)Date January 31, 1948

CURRENT ASSETS:

1.	Cash (including cash collateral \$_____)	\$ (14.49)
2.	Notes receivable (customers) ¹ (exclusive of line 24)	
3.	Accounts receivable (customers) ¹ (exclusive of line 24)	
4.	Merchandise—Finished (exclusive of line 23)	
5.	Merchandise—In process (exclusive of line 23)	
6.	Raw materials (exclusive of line 23)	986.36
7.	Supplies	1115.41
8.	Other (describe) ²	
9.		
10.		

TOTAL CURRENT ASSETS

\$ 2097.28

FIXED AND OTHER ASSETS:

11.	Land	\$
12.	Natural resources, timber, minerals, etc.	
13.	Buildings	
14.	Machinery and equipment	15224.34
15.	Furniture, fixtures, office equipment, etc.	565.00
16.	Patterns, designs, molds, etc.	
17.	Due from officers, employees, directors, stockholders, etc. ³	
18.	Investment in affiliate and/or subsidiary companies ³	
19.	Due from affiliate and/or subsidiary companies ³	
20.	Other investments	
21.	Prepaid and deferred charges	445.00
22.	Good will, patents, etc.	
23.	Old and obsolete inventory	
24.	Slow and doubtful accounts and notes	
25.	Other real estate owned (describe) ³	
26.	Other (describe) ³	
27.		
28.		

TOTAL ASSETS

\$ 18319.62

NOTE.—Information called for in footnotes required in all cases. Furnish on separate sheet schedule of all secured liabilities, including R. F. C. debt, with full information as to assets pledged or other security.

CURRENT LIABILITIES:

29.	Notes payable—Banks	\$ 500.00
30.	Notes payable—Merchandise	
31.	Other notes ² (<u>Ted Hunter</u>)	468.69
32.	Accounts payable—Merchandise	1655.84
33.	Due to officers, employees, directors, stockholders, etc. ³	
34.	Due to affiliate and/or subsidiary companies ³	
35.	Accrued taxes ³ (<u>W.H., S.S. & Unemployment</u>)	132.31
36.	Accrued interest, wages, etc.	
37.	Other (describe) ³	
38.		
39.		

TOTAL CURRENT LIABILITIES

\$ 2756.84

FIXED AND OTHER LIABILITIES:

40.	R. F. C. (entire principal amount outstanding)	\$ 9322.04
41.	Other mortgages (state maturity)	
42.	Debentures (state maturity)	
43.	Stand-by debt (describe) ³	
44.	Other (describe) ³	
45.		

TOTAL LIABILITIES

\$ 12078.88

46.	RESERVE FOR DEPRECIATION ³ (give allocation separately)	\$ 4055.04
47.	RESERVE FOR DEPLETION ³	
48.	OTHER RESERVES ³	
49.	CAPITAL—PREFERRED STOCK (number of shares outstanding _____)	
50.	COMMON STOCK (number of shares outstanding _____)	
51.	SURPLUS	2155.70
52.	CAPITAL ACCOUNT (if not a corporation)	
	GRAND TOTAL LIABILITIES AND NET WORTH	\$ 18319.62
53.	CONTINGENT LIABILITIES ³	

¹ Give aging of receivables and list bad debt reserves on separate legal-size sheet.² Give details on separate legal-size sheet.³ Include all liability for income taxes, social security, old-age benefit, etc., due within 1 year and furnish schedule.The above and supporting schedules constitute a true statement of the financial condition of this
Proprietorship to the best of my knowledge and belief.
(Corporation, partnership, etc.)

Per _____

Treasurer.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

1948

For calendar year 1948 or fiscal year beginning 1948, and ending

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than \$5,000, consisting wholly of wages shown on Forms W-2, or of such wages and not more than \$100 of other wages, dividends, and interest.

Name L. L. Moore
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)

HOME ADDRESS 125 PARKER AVE
(PLEASE PRINT. Street and number or rural route)
SANTA ROSA New Mexico
(City, town, or post office) (Postal zone number) (State)

Occupation BAKER Social Security No.

Do not write in these spaces

File Code
Serial No. 9181001
(Cashier's Stamp)

RECEIVED
OCT 11 1949
COLL. INT. REV.
DIST. N. MEX.

Fryman

Your exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives (as defined in instructions) with 1948 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Check below whether you (or your wife) were at the end of your taxable year—		On lines a and b below— Write 1 if neither 65 nor blind; Write 2 if either 65 or blind; Write 3 if both 65 and blind.
	65 OR OVER	BLIND	
Your name <u>L. L. Moore</u>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>	a. Number of exemptions for you <u>2</u>
Wife's (or husband's name) <u>Lucille Moore</u>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>	b. Number of her (his) exemptions
Name of Other Dependent Relative			Address—If different from yours

Your income

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) →

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1948, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Members of armed forces and persons claiming traveling or reimbursed expenses, see instructions.

Print Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
		\$	\$
		\$	\$
		\$	\$
Enter totals		\$	\$

3. Enter here the total amount of your dividends

4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)

5. If you received any other income, give details on page 2 and enter the total here

6. Add income shown in items 2, 3, 4, and 5, and enter the total here

How to figure your tax

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—To obtain benefits of split-income provisions, husband and wife must file a joint return. If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax due or refund

7. Enter your tax from table on page 4, or from line 18, page 3. \$ XX XX

8. How much have you paid on your 1948 income tax?
(A) Total tax in item 2, above (attach Original Forms W-2) \$ XX XX
(B) By payments on 1948 Declaration of Estimated Tax \$ XX XX
Enter total here →

9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here. \$ XX XX
This balance of tax due must be paid in full with return.

10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here. \$ XX XX
Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1948 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1947

To which Collector's office was it sent? Albuquerque

To which Collector's office did you pay amount claimed in item 8 (B), above?

Is your wife (or husband) making a separate return for 1948? No
(Yes or No)

If "Yes," write her (or his) name

Collector's office to which sent

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of preparer, other than taxpayer, preparing this return) (Date)

(Signature of taxpayer) (Date)

(Name of firm or employer, if any) (Signature of taxpayer's wife or joint filer, if this is a joint return) (Date)

To secure any benefits of split-income provisions, husband and wife must include all their income, and report 100% of it, even though only one has income.

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in) \$
 2. Amount received tax-free in prior years \$
 3. Remainder of cost (line 1 less line 2) \$
 4. Total amount received this year \$
 5. Excess, if any, of line 4 over line 3 \$
 6. Enter line 5, or 3 percent of line 1, whichever is greater (but do not enter more than line 4) \$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind and location of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (explain in Schedule G)
	\$	\$	\$	\$
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$	\$	\$	\$

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

- State (1) nature of business BAKERY; (2) business name Moore's Bakery;
 (3) business address 125 PARKER AVE - SANTA ROSA N.M.
 Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession.

1. Total receipts	\$58,240.75
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C" or "M" on lines 2 and 3 if inventories are valued at either cost, or cost or market, whichever is lower)	
2. Inventory at beginning of year	\$2,101.77
3. Merchandise bought for sale	
4. Labor	
5. Material and supplies	33,153.97
6. Other costs (explain in Schedule G)	
7. Total of lines 2 to 6	\$35,255.74
8. Less inventory at end of year	2,071.99
9. Net cost of goods sold (line 7 less line 8)	\$33,183.75
10. Gross profit (line 1 less line 9)	\$25,057.00
OTHER BUSINESS DEDUCTIONS	
11. Salaries and wages not in line 4	\$12,643.99
12. Interest on business indebtedness	261.89
13. Taxes on business and business property	534.32
14. Losses (explain in Schedule G)	
15. Bad debts arising from sales or services	22.22
16. Depreciation, obsolescence, and depletion (explain in Schedule F)	2,885.55
17. Rent, repairs, and other expenses (explain in Schedule G)	8,601.41
18. Amortization of emergency facilities (attach statement)	
19. Net operating loss deduction (attach statement)	
20. Total of lines 11 to 19	\$24,949.47
21. Total of lines 9 and 20	\$58,133.22
22. Net profit (or loss) (line 1 less line 21)	107.59

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)
 2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. Amount, \$
 2. Name and address of estate or trust Amount, \$
 3. Other sources (state nature) Amount, \$
 4. Total

Total income from above sources (Enter as item 5, page 1)

107.59

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (if buildings, state method of valuation)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated amount to be recovered by depreciation	8. Estimated amount to be recovered by depreciation	9. Depreciation allowable this year
See Schedule ATTACHED								

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	4. Column or Line No.	5. Explanation	6. Amount
Line 17	Rents	\$895.00		Advertising Operation	\$1317.85
	Repairs Bldg	177.63		Tobacco Disbursements	1064.22
	" Equip	127.07		Other Expenses	2550.59
	" Trucks	825.46			1601.41
	Utilities	1598.57			

**Moore's Bakery.
Depreciation Schedule.**

		Year Ending Jan. 31, 1949.				
	Date Acq.	Orig. Cost	Prior Depr.	Remaining Cost	Est. Life	Depr. 1948
Baking Equipment	Apr. 1942	2,350.00	2,219.42	130.58	6 yrs.	130.58
" "	Nov. 1946	3,500.00	680.55	2,819.45	6 yrs.	583.33
" "	Feb. 1947	45.00	7.50	37.50	6 yrs.	7.50
" "	July 1947	5,784.69	465.90	5,318.79	6 yrs.	964.11
" "	Dec. 1947	94.65		94.65	6 yrs.	15.78
						1,701.30
Furn. & Fixtures	Apr. 1942	480.00	248.18	231.82	10 yrs.	48.00
" "	Feb. 1947	85.00	8.50	76.50	10 yrs.	8.50
1936 Station Wagon	July 1946	850.00	424.99	425.01	3 yrs.	283.33
1947 Truck	Jan 1947	2,600.00		2,600.00	3 yrs.	866.66
Totals		15,789.34	4,055.04	11,734.30		2,907.79

MEAD'S PINE BREAD COMPANY VS. L. L. MOORE

September 23, 1949.

Mr. Lamoine Moore, Moore's Bakery, Santa Rosa, New Mexico.

509 Dear Mr. Moore: Frank tells me that you never received the tax returns and work papers which I sent you in plenty of time for filing. I have searched through everything here in the hopes that I might find pencil copies which would help get things straightened out. But as I expected, I had destroyed all such things when we moved here as I didn't suppose they would ever be needed.

I hardly see what I can offer to do to help you, at this great distance, but perhaps you may use this letter to show that your delay in filing was not due to any negligence on your part, and that I believed the papers had reached you several months ago.

I am certainly sorry that the papers were lost either in the mail or in the mailing, and sincerely wish that I could do something to aid in clearing up the matter. If there is anything I can do, don't hesitate to let me know.

Very truly yours,

KATHERINE CAMPOS.

Shady Grove Trailer Court, 1100 Blk. Ft. Worth Ave., Dallas, Texas.

Collector of Internal Revenue.*

Gentlemen: This explains the reason for this return being late.

L. L. MOORE.

*Handwritten notation.

[Certification of Chief, Income Tax Division, attached to original exhibit.]

File this return with Collector of Internal Revenue on or before March 15, 1947. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filling out return.

Page 1

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1946

200
1946

or fiscal year beginning Feb. 1, 1946, and ending Jan. 31, 1947

EMPLOYEES.—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Name Linton L. Moore (PLEASE PRINT. If this return is for a husband and wife, use both first names)
P.O. Box 49

ADDRESS Santa Rosa (PLEASE PRINT. Street and number or rural route)
Gaudalupe (City or town, postal zone number) N. Mex. (County) (State)

Occupation Baker Social Security No. 1 3232

Do not write in these spaces

File Code
Serial No. 3-47 200192

District 7-47
(Center of District)

MAILED WITH RETURN
85 MAR 15 1947
COLL. INT. DIV.
DIST. 1

Your Exemptions

List your own name.
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in Instruction 1) with 1946 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Relationship	Name (please print)	Relationship
1. <u>Linton L. Moore</u> Your name	<u>XXXXXXX</u>	<u>206.58</u>	

Your Income

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1946, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues,

insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Print Employer's Name	Where Employed (City and State)	Amount
		\$

Enter total here → \$

3. Enter here the total amount of your dividends	
4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)	
5. If you received any other income, give details on page 2 and enter the total here	<u>5058 03</u>
6. Add amounts in items 2, 3, 4, and 5, and enter the total here	<u>5058 03</u>

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

7. Enter your tax from table on page 4, or from line 12, page 3	<u>811 58</u>
8. How much have you paid on your 1946 income tax? (A) By withholding from your wages (B) By payments on 1946 Declaration of Estimated Tax	<u>605 00</u>
9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here	<u>206 58</u>
10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here	<u>206 58</u>

Check (✓) whether you want this overpayment: Refunded to you ☒ or Credited on your 1947 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1943
To which Collector's office was it sent? Albuquerque
To which Collector's office did you pay amount claimed in item 8 (B), above? Albuquerque

Is your wife (or husband) making a separate return for 1946? NO
If "Yes," write below:
Name of wife (or husband) _____
Collector's office to which sent _____

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) (Date) (Signature of taxpayer) (Date)

(Name of firm or employer, if any) (If this is a joint return of husband and wife, it must be signed by both)

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)	\$	4. Total amount received this year	\$
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3	
3. Remainder of your cost (line 1 less line 2)	\$	6. Enter line 5, or 5 percent of line 1, whichever is greater (Attach separate schedule for each additional annuity or pension)	\$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (explain in Schedule G)
	\$	\$	\$	\$
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$	\$	\$	\$

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(State (1) nature of business Bakery; (2) business name Moore's Bakery)

1. Total receipts	\$	37,425.63
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C" or "M" on lines 2 and 3 if inventories are valued at either cost, or cost or market, whichever is lower)		
2. Inventory at beginning of year	\$	
3. Merchandise bought for sale		
4. Labor		
5. Material and supplies		
6. Other costs (explain in Schedule G)		
7. Total of lines 2 to 6	\$	
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 less line 8)	\$	
10. Gross profit (line 1 less line 9)	\$	
OTHER BUSINESS DEDUCTIONS		
11. Salaries and wages not in line 4	\$	7,237.72
12. Interest on business indebtedness		
13. Taxes on business and business property		462.72
14. Losses (explain in Schedule G)		543.60
15. Bad debts arising from sales or services		
16. Depreciation, obsolescence and depletion (explain in Schedule F)		600.00
17. Rent, repairs, and other expenses (explain in Schedule G)		1,359.66
18. Amortization of emergency facilities (attach statement)		
19. Net operating loss deduction (attach statement)		10,000.70
20. Total of lines 11 to 19	\$	38,366.50
21. Total of lines 9 and 20	\$	
22. Net profit (or loss) (line 1 less line 21)		5,059.03

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc.	Amount,	\$
2. Name and address of estate or trust	Amount,	
3. Other sources (state nature)	Amount,	
4. Total		

Total income from above sources (Enter as item 5, page 1)

5,059.03

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
Bread mixer, cake mixer, Dough break, moulder, Divider, oven, pans, slider, Hooks, fixture, truck		4,000.00	13%	none				000.00

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 2, 14, AND 17 OF SCHEDULE C

1. Column of Line No.	2. Explanation	3. Amount	1. Column of Line No.	2. Explanation	3. Amount
6	Frt. & Express	337.03	6	Telephone & Telegraph	157.94
6	Fuel (gas & oil)	614.88	6	Advertising	492.19
6	Delivery expense	542.57	14	Losses (returned Made)	543.60
6	Lights, water, power	252.47			
6	Insurance	54.15			

Do not itemize deductions if— (1) You determine your tax from the tax table on page 4. (2) Your total income is \$5,000 or more and you claim the \$500 standard deduction. If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

Page 3

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

Amount

Contributions

Allowable Contributions (not in excess of 15 percent of item 6, page 1)

Interest

Total Interest

Taxes

Total Taxes

Losses from fire, storm, shipwreck, or other casualty, or theft.

Total Allowable Losses (not compensated by insurance or otherwise)

Medical and dental expenses

Net Expenses (not compensated by insurance or otherwise)

Enter 5 percent of item 6, page 1, and subtract from Net Expenses

Allowable Medical and Dental Expenses. See instruction for limitation

Miscellaneous (See Instructions)

Total Miscellaneous Deductions

TOTAL DEDUCTIONS

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 6, page 1. This is your Adjusted Gross Income 5059 03
2. Enter DEDUCTIONS (If deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1 above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500) 500 00
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income 4559 03
4. Enter your exemptions (\$500 for each person whose name is listed in item 1, page 1) 500 00
5. Subtract line 4 from line 3. Enter the difference here \$ 4059 03
6. Use the tax rates in instructions to figure your combined tentative normal tax and surtax on amounts entered on line 5. Enter the tentative tax here. (If line 3 above includes partially tax-exempt interest, see Tax Computation Instructions) \$ 855 35
7. Enter here 5 percent of amount entered on line 6 43 77
8. Subtract line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax. (If alternative tax computation is made on separate Schedule D, enter here tax from line 12 of Schedule D) \$ 811 58

IF YOU USED THE \$500 STANDARD DEDUCTION IN LINE 2, DISREGARD LINES 9, 10, AND 11, AND COPY ON LINE 12 THE SAME FIGURE YOU ENTERED ON LINE 8.

9. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116) \$
10. Enter here any income tax paid at source on tax-free covenant bond interest
11. Add the figures on lines 9 and 10 and enter the total here
12. Subtract line 11 from line 8. Enter the difference here and in item 7, page 1. This is your tax \$

[Certification of Chief, Income Tax Division, attached to original exhibit.]

10-49234-1

300

File this return with Collector of Internal Revenue on or before March 15, 1948. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filing this return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN FOR CALENDAR YEAR 1947

Page 1
200
1947

or fiscal year beginning Feb. 1, 1947, and ending Jan. 31, 1948

EMPLOYEES.—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$1,000, excluding salary of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, salaries, and interest.

Name L. L. Moore

(PLEASE PRINT. If this return is for a husband and wife, use both last names)

ADDRESS

(PLEASE PRINT. Street and number or rural route)

Santa Rosa

Guadalupe

N.M.

(City or town, postal town number)

(County)

(State)

Occupation Bakery Owner

Social Security No.

Do not write in these spaces

File
No. 4-48200432

Date 7-15-47
(Certified copy)

FILED WITH RETURN

COLL. 15
DIST. 1

Your
Exemptions

List your own name.

If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

1.	Name (print)	Relationship	Name (print)	Relationship
Your name	<u>L. L. Moore</u>	<u>XXXXXXXXXX</u>		

List names of other close relatives (as defined in Instruction I) with 1947 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your
Income

Enter your total wages, salaries, interest, annuities, and other income. See instructions in 1047, BEFORE PAY-ROLL DEDUCTIONS for item 2.

Insurance, bonds, etc. See instructions in 1047, BEFORE PAY-ROLL DEDUCTIONS for item 2.

2.	From Employer's Name	When Reported (City and State)	Amount
	<u>Santa Rosa Public Schools</u>		<u>2513 25</u>

Enter total here → 2513 25

How to
Figure
Your Tax

3. Enter here the total amount of your dividends.
4. Enter here the total amount of your interest (including interest from Government obligations, unless wholly exempt from taxation).
5. If you received any other income, give details on page 2 and enter the total here. 1552 54
6. Add amounts in items 2, 3, 4, and 5, and enter the total here. 2/ 4065 82

IF YOUR INCOME WAS LESS THAN \$10,000.—Use the table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, annuities, bonds, medical expenses, and other deductions. If your expenditures and losses of these items amount to more than 10 percent, it will usually be to your advantage to itemize them and complete your tax on page 2.

IF YOUR INCOME WAS \$10,000 OR MORE.—Complete the tax table and complete your tax on page 2. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and use standard deductions, the other must also itemize deductions.

Tax Due
or
Refund

7. Enter your tax from table on page 4, or from line 12, page 3. 253 00
8. How much have you paid on your 1947 income tax?
(A) By withholding from your wages. 2/358 80
(B) By payments on 1947 Declaration of Estimated Tax. 169 40
Enter total here → 169 40
9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here. 83 60
10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here.

If you filed a return for a prior year, what was the latest year? 1946

To which Collector's office was it sent? Albuquerque, N.M.
To which Collector's office did you pay amount claimed in item 8 (B), above?

Is your wife (or husband) making a separate return for 1947? YES
If "Yes," enter below:
Name of wife (or husband) Lucille Moore
Collector's office to which sent Albuquerque, N.M.

I declare under the penalties of perjury that this return (including any accompanying schedule and statement) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) (Date) Al Moore April 4
(Signature of taxpayer) (Date) Lucille Moore
(If this is a joint return of husband and wife, it must be signed by both)

*Filed in accordance with the Community Property Law of the State of New Mexico.

1. Cost of timber (total amount you paid in)	\$		4. Total amount received this year	\$	
2. Amount received tax-free in prior years	\$		5. Balance, if any, of line 4 over line 3	\$	
3. Remainder of your cost (line 1 less line 2)	\$		6. Enter line 5, or 3 percent of line 1, whichever is greater	\$	

Other income from an estate with a credit

1. Unit of property	2. Amount of unit or units		3. Quantity of 2 (multiplied by column 2)		4. Rights reserved in column 3		5. Other rights reserved in column 3	
	\$		\$		\$		\$	
Net profits (or loss) (Col. 2 less sum of cols. 3, 4, and 5)	\$		\$		\$		\$	

Do NOT include in this schedule out of pocket expenses for personal use or deductions not connected with business or profession.

22. Net profit (or loss) (line 1 less line 21)

\$	1552	34
----	------	----

1. Kind of property (If buildings, state whether of which specified)	2. Date acquired	3. Cost or other basis, (do not include land or other nondepre- ciable property)	4. Amount fully depre- ciated to end of end of year	5. Depreciation at close (or otherwise) in prior years	6. Remaining cost or other basis to be depreciated	7. Estimated life and to be depreciated by straight line	8. Estimated percentage depreciated to date	9. Depreciable amount for year
See attached schedule.		\$	\$	\$	\$			\$

[illegible]

Moore's Bakery

Profit and Loss Statement

February 1, 1947 thru Jan. 31, 1948

Sales - W. S.			\$42907.42
Sales - Retail			<u>4835.21</u>
Total Sales			\$47742.63
Less Cost of Sales:			
Materials			
Inventories, 2/1/47			
Food	\$ 1005.85		
Supplies	453.08	\$ 1488.93	
Purchases - Food	<u>\$25577.65</u>		
- Supplies	3342.36		
Freight In	<u>231.32</u>	<u>29151.33</u>	
		<u>\$30840.28</u>	
Less Inventories 1/31/47			
Food	\$ 984.56		
Supplies	<u>1115.41</u>	<u>2101.77</u>	
Cost of Materials			\$28538.49
Labor			8247.77
Overhead			
Rent	\$ 655.00		
Repairs & Main. - Bldg.	573.65		
Repairs & Main. - Equip.	83.75		
Repairs & Main. - Furn. & Fix.	45.00		
Insurance Expense	96.53		
Laundry Expense	103.53		
Utilities	997.94		
Tel. & Tel.	141.98		
Misc. Exp.	462.15		
Taxes	450.91		
Depr. - Equipment	1448.39		
Depr. - Furn. & Fix.	<u>56.50</u>	<u>5115.34</u>	
Gross Profit on Sales			41901.60
Delivery Expense			\$ 5841.03
Wages		\$2600.00	
Delivery Expense		431.49	
Repairs and Main. - Trucks		378.49	
Depr. - Del. Trucks		<u>283.53</u>	
			<u>3693.51</u>
Administrative Expense			\$ 2147.52
Advertising		\$ 285.63	
Office Expense		37.91	
Memberships and Dues		27.50	
Travel and Entertainment		86.00	
Bookkeeping Service		111.25	
Interest Expense		<u>141.66</u>	
			<u>689.95</u>
Net Profit on Operations			\$ 1457.57
Other Income		\$ 104.94	
Less Other Expense		<u>9.97</u>	
Net Profit, 2/1/47 thru 1/31/48			\$ 1552.54

MOORE'S BAKERY
Depreciation Schedule
Feb. 1, 1947 thru Jan. 31, 1948

Kind of Property	Date Acq.	Cost	Prior Depr.	Rem. Cost	Estimated Life	Depr. 1947
Equipment						
Used equip.--lump sum purchase	Apr. 1942	\$ 2350.00	\$ 1827.76	\$ 522.24	6 yrs.	\$ 391.66
Hayssen wrapping mach. & slicer - Thompson						
Moulder - Century Div. -						
Bread mixer - Rounder -						
Dough box	Nov. 1946	3500.00	97.22	3402.78	6 yrs.	583.33
Motor	Feb. 1947	20.00		20.00		
Boiler	Feb. 1947	25.00		25.00	6 yrs.	7.50
Mixer	July 1947	979.38		979.38		
Air Conditioner	July 1947	242.36		242.36		
Refrigerator	July 1947	100.00		100.00		
Misc. Racks, etc.	July 1947	1341.65		1341.65		
Oven	July 1947	3121.30		3121.30	6 yrs.	465.90
Racks, etc.	Dec. 1947	94.65		94.65	6 yrs.	None
Total Equipment		11774.34	1924.98	9849.36		1448.39
Furniture and Fixtures						
Show Cases	Apr. 1942	50.00	23.36	26.64	10 yrs.	5.00
Neon Sign	Apr. 1942	245.00	98.00	147.00	10 yrs.	24.50
Desk	Apr. 1942	30.00	14.00	16.00	10 yrs.	3.00
Adding Machine	Apr. 1942	75.00	27.46	47.54	10 yrs.	7.50
Cash Register	Jan. 1942	80.00	37.36	42.64	10 yrs.	8.00
Awning, shelves, etc.	Feb. 1947	85.00		85.00	10 yrs.	8.50
Total Furniture & Fix.		565.00	200.18	364.82		56.50
Delivery Trucks						
1936 Ford Station Wagon	July 1946	850.00	141.66	708.34	7 yrs.	242.55
1947 Chev. Truck	Jan. 1947	2600.00		2600.00		
Total Delivery Trucks		3450.00	141.66	3308.34		283.33
TOTAL		\$15749.34	\$2266.82	\$13522.52		\$1788.22

FINANCIAL STATEMENT—COMMERCIAL

Defendants' Exhibit H.

Individual
Partnership
Corporation

Name 11,000,000 D.A.N. 37

To

Bank

Address 2414 N. 10th A.M.

Business

Location

For the purpose of procuring credit from time to time, the undersigned hereby submits the following statement of condition as of 1937. The undersigned hereby maintains and guarantees that said statement is in all respects true and correct; and you may consider the same as continuing to be true and correct until written notice of a change is given to you by the undersigned.

ASSETS

LIABILITIES

Cash (on hand and in bank)	\$	2000	Notes Payable to Banks	\$	0
Accounts Receivable			Notes Payable to Others		0
Notes Receivable			Accounts Payable		2000
Merchandise		2000	Other Current Liabilities (describe fully)		
Other Current Assets (describe fully)					
Total Current Assets		31317	Total Current Liabilities		2000
Due from Subsidiaries			Due to Members of Firm		
Due from Members of Firm			Mortgages on Real Estate (describe on other side)		
Stocks and Bonds (list on other side)			Other Liabilities (describe fully)		
Real Estate (list on other side) \$					
Less Depreciation \$	Net				
Machinery and Fixtures \$			Total Liabilities		
Less Depreciation \$	Net		Net Worth (if individual or partnership)		31317
Other Assets (describe fully)			Total		
			Capital Stock*		
			Surplus and Profits*		
			(*Fill out above 2 lines if corporation)		
Total		31317	Total		31317

Amount of assets listed above which are exempt by law

Specify any of the above assets pledged as collateral

Specify any of the above liabilities secured by collateral

CONTINGENT LIABILITY: Upon accommodation notes \$ As endorser \$ As guarantor \$

INSURANCE: On Merchandise \$ Buildings \$ Machinery \$

LIFE INSURANCE: Amount \$ To whom payable

The undersigned declares and certifies that the above statement and schedules on opposite side are a true and correct account of the condition of my/our business on the day above stated.

WITNESS:

(Signature)

W. Moore

We certify this to be a correct copy of statement held in our files.

(Name of Bank)

By

(Title)

(Fill Blanks on Other Side)

Defendants' Exhibit J.

323

[Advertisement from Tucumcari Daily News, October 11, 1948.]

MEAD'S
FINE
BREAD

Is Now Selling at
1 lb. loaf for 10c
1 1-2 lb. loaf, 15c
at
Santa Rosa

HELP YOURSELF
wash, plenty of steam
up and delivery ser
Sno-White Laundry.

EDELMAN'S Help
with Bendix and 3
We pick up and de
First.

Plenty of gas furna
OGDEN PLUMBIN
METAL CO., 1923

LAND LI
Roy Cline at
324 So

Winter's coming
your heating nee
propane and buta
ment and service.
next to Cactus Cl

Have your rugs,
bolstered furni
cleaned and sha
own home. Sati
ed, reasonable

DAVE AND HC
212 E. Aber —
Phone 1119-

JOE'S MET
116 No.
Telephc

MERCH

Defendants' Exhibit I.

[Advertisement from Clovis News-Journal, October 24, 1948.]

NOTICE
Mead's FINE Bread
IS NOW SELLING A ONE
POUND LOAF AT 10c AND
A 1½ LB. LOAF AT 15c IN
SANTA ROSA

Clerk's Certificate.

525 I, Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico, do hereby certify:

That the attached and foregoing are the original of the pleadings, documents, Reporter's Transcript of Testimony and Exhibits as specified in Appellant's Designation appearing at page 524, all of which were filed in my office in the above entitled and numbered cause, with the exception of plaintiff's Exhibit 1—a chart which will be separately transmitted.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court at Albuquerque in said district this 2nd day of February, 1953.

(Seal)

WM. D. BRYARS,
Clerk of said Court.

Filed United States Court of Appeals Tenth Circuit,
February 5, 1953, ROBERT B. CARTWRIGHT, Clerk.

Supplemental record filed March 28, 1953.

September 8 and 9, 1953

[Omitted in printing.]

327 In United States Court of Appeals, Tenth Circuit

November Term, 1953

No. 4615

MEAD'S FINE BREAD COMPANY, A CORPORATION, APPELLANT

v.

L. L. MOORE, D. B. A MOORE'S BAKERY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF NEW MEXICO*Opinion*

December 11, 1953

Edward W. Napier (Howard F. Houk was with him on the brief) for Appellant. Dee C. Blythe and Lynell G. Skarda for Appellee.

Before PHILLIPS, Chief Judge, and MURRAH and PICKETT, Circuit Judges

MURRAH, *Circuit Judge*.

This is an appeal from a verdict and judgment in favor of the plaintiff-appellee in an action for treble damages under the Robinson-Patman Amendment to the Clayton Act (15 U. S. C. A. 13 (a), 13a and 15). When the case was first here (184 F. 2d 338) on appeal from a judgment of the trial court dismissing the action, we affirmed on the ground that the suit was precluded by the plaintiff's own illegal acts which initiated the alleged
328 price discrimination. On certiorari to the Supreme Court, the case was vacated for reconsideration in the light of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, in which it was held that an action under Section 15 of the anti-trust laws was not precluded by the claimant's infractions.

On further consideration, we receded from our former position, and looking at the facts of record, pointed out that by selling its products through outlets across the state line in Texas, Mead was engaged in interstate commerce, and by selling bread in Santa

Rosa, New Mexico, below cost, it discriminated against its competitor plaintiff-appellee. Price discrimination and interstate commerce having been shown, we left open the question whether the effect of such discrimination might tend to substantially lessen competition or create a monopoly in any line of commerce, or injure, destroy or prevent competition with Mead or its customers. The case was accordingly reversed and remanded for the determination of that fact. See 190 F. 2d 540. But in leaving the case to the undetermined facts, we did not thereby intend to hold or imply that the mere fact of interstate commerce and local price discrimination, standing alone, made out a prima facie case for the plaintiff. Indeed, on first consideration, doubt was expressed whether the purely local price-cutting war had any actionable effect or impact upon interstate commerce. See 184 F. 2d 338, 340.

Recognizing the necessity of proof on this crucial issue, the trial court charged the jury, substantially in the language of the statute, that it was incumbent upon the plaintiff to establish by a preponderance of the evidence that the defendant, while engaged in interstate commerce, and in the course of such commerce, either directly or indirectly, discriminated in price between different purchasers of its products, sold for use, consumption or resale in Santa Rosa, and that the effect of such discrimination might substantially lessen competition or tend to create a monopoly

329 in such line of commerce, see Section 2 (a) of the Clayton Act, as amended, 49 Stat. 1526, 15 U. S. C. A. 13 (a); or that the defendant, while engaged in interstate commerce, and in the course of such commerce, sold goods at Santa Rosa, at prices lower than those exacted by defendant elsewhere in the United States for the purpose of destroying competition or eliminating a competitor in Santa Rosa, or to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. Section 3, 49 Stat. 1528, 15 U. S. C. A. 13a. It was on these pertinent instructions that the jury found for the plaintiff and assessed his damages at \$19,000, which the trial court tripled and entered judgment accordingly, together with attorney fees in the sum of \$11,400.

The first of the statutory instructions is the embodiment of the now accepted view that purely local transactions in the form of price-fixing or discrimination come within the ban of the anti-trust laws, when such transactions may have the effect of interfering with the free flow of competitive trade and commerce. *Swift & Co. v. U. S.*, 196 U. S. 375; *Shreveport Rate Cases*, 234 U. S. 342; *Wickard v. Filburn*, 317 U. S. 111; *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219. The latter part of the court's instructions in the disjunctive is the embodi-

ment of the equally accepted complementary view that interstate commerce powers, when exerted to their fullest under the anti-trust laws, forbid the utilization of interstate commerce for the purpose of monopolizing local trade or business, whether through price-fixing or other discriminatory practices. *Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255; *Lorain Journal Co. v. United States*, 342 U. S. 143; *United States v. Griffin*, 334 U. S. 100; *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231. Local price-fixing or discrimination is within the anti-trust laws if the means adopted for its accomplishment reach beyond the boundaries

of one state. *United States v. Frankfort Distilleries, Inc.*, 330 U. S. 293. And, since the design of the Robinson-Patman Amendment was to pinpoint protection of the anti-trust laws "to the competitor victimized by the discrimination," the victim may maintain an action for damages without showing that the competitive injury was general in its scope and effect. *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 49; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726. But, whether the claim is asserted under the Sherman Act or the Clayton Act, as amended, the wrongs complained of must involve interstate commerce, either in "effect" or "purpose," for obviously, the acts can have no greater potency than the commerce clause itself.

Local conduct which is separable and unrelated to interstate commerce is necessarily insulated from the operation of the anti-trust laws, and so, in making application of the Clayton Act, as amended, to local purchases and sales, it is important to keep in mind the "obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." *United States v. Frankfort Distilleries, Inc.*, *supra*, p. 297. "* * * it is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power." *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 120.

At least part of the time during which it was selling bread in Santa Rosa, Mead was also selling bread across state lines to outlets in Texas. And, it discriminated in price between the purchases of bread in Santa Rosa and those made in Texas, so that at least some of the purchases involved in the discrimination were in commerce. But there is positively no evidence that the discriminatory sales had even the probable effect of lessening competition or

tended to create a monopoly in any line of commerce, or to destroy or prevent competition with Mead at any place except Santa Rosa, New Mexico, or any of its customers at

any place in the United States except Santa Rosa. The sales made at Santa Rosa were to purchasers for resale locally. The competitive injury resulting from the sale was to a purely local competitor whose business was in no way related to interstate commerce. If competition was lessened or a monopoly created, it was purely local in its scope and effect and in no way related to or affected interstate commerce. The *suppressive effect* of the discriminatory sales on competition at Santa Rosa, reprehensible as they may have been, did *not reach beyond the jurisdiction of New Mexico and cannot therefore be found to be within the "effect"* provisions of 13 (a) of the Clayton Act, as amended.

Our case is not like *Mandeville Farms v. American Crystal Sugar Co.*, supra, where local price-fixing of sugar beets adversely affected the interstate sale and distribution of refined sugar. Nor is it like *Corn Products Refining Co. v. Federal Trade Commission*, supra, where the discriminatory sales of commodities were made to purchasers competing in interstate commerce. Nor is it comparable to *George VanCamp & Sons Co. v. American Can Co.*, 278 U. S. 245, where both of the competing purchasers were engaged in interstate commerce.

Undoubtedly Mead sold bread in one part of the United States, to-wit, Santa Rosa, at prices lower than those exacted by it elsewhere in the United States, to-wit, Farwell Texas, and the lower price at Santa Rosa may be said to have been made for the "purpose of destroying competition or *eliminating a competitor*" at Santa Rosa. The facts thus read upon the literal language of the statute. But the statute must be kept within the constitutional power of Congress to regulate commerce. It follows then, to be constitutionally actionable under 13a, interstate commerce must

332 be monopolized or utilized to effectuate the objective. In other words, the means employed for the elimination of the purely local competitor must, in some effective way, reach beyond state boundaries. In that respect, our case is different from *United States v. Frankfort Distilleries*, supra, where interstate commerce was monopolized to effect a local objective; or *Standard Oil Co. v. Federal Trade Commission*, supra, where discriminatory sales were made interstate to local competitors. See also *Federal Trade Commission v. Morton Salt Co.*, supra. In those cases, interstate commerce was the forbidden means for the achievement of the local purpose. Here, although Mead was engaged in commerce, the sales made in the course of such commerce were not the means for the elimination of the local competitor. The means for the achievement of the local purpose did not extend beyond state lines.

The evidence showed that some of the stockholders and officers of the Mead Bakery at Clovis, New Mexico, were also stockholders

PROFIT AND LOSS STATEMENT—FIVE YEAR ENDING

1934

DEBITS

CREDITS

Cost of merchandise or material sold	126-25	Sales, Net—less returns	126-25
Actual operating expenses:		Income from cash discounts	
Rent		Income from investments	
Salaries		Income from other sources (describe fully)	
Taxes, insurance, etc.	57-16		
Amount set up for depreciation	144-00		
Bad debts charged off			
Other expenses (describe fully)			
	180-00		
	457-83		
Net Profit		Net Loss	356-00
Total	1356-31	Total	1356-31

Date and amount of last dividend paid—(date) _____ (amount) \$ _____

Average terms on sales _____ On purchases _____

Time of year when notes and accounts receivable are generally maximum, date _____ Amount \$ _____

Minimum, date _____ Amount \$ _____

Time of year when stock of merchandise is generally maximum, date _____ Amount \$ _____

Minimum, date _____ Amount \$ _____

Time of year when liabilities are generally maximum, date _____ Amount \$ _____

Minimum, date _____ Amount \$ _____

Is statement based on actual inventory? _____ If so, date _____ If not, how? _____

Have books been audited by a certified public accountant? _____

If so, date _____ and by whom _____

If you have ever failed in business, attach a complete explanation and state basis of settlement with creditors.

REAL ESTATE

Acreage or Dimensions	Location	Description of Improvements	VALUATION		LIENS		Title in Whose Name
			Assessed	Actual	When Due	Amount	

STOCKS AND BONDS OWNED

DESCRIPTION	If Stocks, Show No. of Shares	Par Value	Market Value	Title in Whose Name

If a partnership, fill out following schedule:

PARTNERS

NAMES OF GENERAL PARTNERS	ADDRESS	Interest in Business	Amount Due to Firm	Time Devoted to This Business	Estimated Net Worth Outside This Business
		\$	\$		\$

OTHER DATA:

Statements submitted to Federal Reserve Bank must be either signed originals or certified copies. It is the practice of the Federal Reserve Bank to retain in its files all statements submitted with notes; therefore on a member bank submits an original it is expected to retain a copy for its own files.

(Over)

and officers of other bakeries in New Mexico and Texas; that all of such bakeries produced and sold bread under the same label and that the labelled wrappers were purchased from the same source. They conducted their advertising campaigns through a common agency which billed each bakery for the amount of advertising used. It was also shown that in many instances, flour for the bakeries was purchased in Texas from a common source and sometimes in common lots. Appellee relies upon this interlocking arrangement to show an interstate corporate structure and activity. But there is nothing in this record to show that the interlocking corporate ownership and management or other business relationships were utilized or were in any way related to the local price war in Santa Rosa. There is nothing to show that bread was shipped from the Texas bakeries to the New Mexico bakeries, or for that matter, from one New Mexico bakery to another, or any other exchange of commodities which might be said to lend an interstate character to otherwise purely local transactions.

333 Our case is indistinguishably similar to *Atlantic Co. v.*

Citizens Ice & Cold Storage Co., 178 F. 2d 453, where the offending competitor, while engaged in commerce, discriminated in price against a purely local competitor. The court held that the local price war had no substantial effect upon interstate commerce and was therefore not within the scope of either the Sherman or Clayton Acts. We agree that the purely local price-cutting war did not affect any line of commerce, nor did the means of its effectuation actionably involve commerce.

The judgment is accordingly reversed with directions to dismiss the action.

334 In United States Court of Appeals

Judgment

December 11, 1953

Twenty-third Day, November Term, Friday, December 11th, 1953. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with directions to dismiss the action, and that Mead's Fine Bread Company, appellant, have and recover of and from L. L. Moore, d/b/a Moore's Bakery, appellee, its costs herein and have execution therefor.

IN UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed December 31, 1953

To the Honorable Judges of the United States Court of Appeals:

Introductory Statement

This Court, contrary to constitutional limitations upon its authority, has read into Section 2 of the amended Clayton Act requirements which are directly contrary to the expressed intention of the Congress. In view of the widespread repercussions resulting from the Court's opinion, and in view of the manifest injury to the appellee, which, needlessly, will go unremedied under the Court's present opinion, appellee respectfully petitions that the Court rehear and reconsider this cause upon the following grounds:

1. The Court committed major error in writing into the Clayton Act the pseudo-requirement that the low price "log" of discrimination must be in interstate commerce.

2. The Court erroneously engrafts upon Section 2 of the amended Clayton Act the pseudo-requirement that the competitive injury resulting from a violation of the Act must be in interstate commerce.

3. Not only has this Court contravened the statute, but it has gone beyond all case law in arriving at its drastic result.

4. The Court erred in holding unconstitutional the application of the Robinson-Patman and Borah-Van Nuys acts to intrastate transactions by persons engaged in interstate commerce unless interstate commerce is directly involved.

5. The Court erred in requiring evidence of the "probable effect" of the discriminatory sales on interstate commerce or competition.

6. The law of this case is that plaintiff-appellee had pleaded and proved a *prima facie* case in the first trial, and defendant-appellant introduced no evidence in the second trial to refute this.

It will be recognized that this statute and this cause are of transcending public importance. As the present opinion now stands, a major portion of legislation which has been the law for forty years, involving federal control over a large part of territorial price discrimination, has been written off the books.

Only upon rehearing can this Honorable Court afford opportunity for correction of the miscarriage of justice, which has occurred in the reversal of the judgment of the District Court.

I

The Court committed major error in writing into the Clayton Act the pseudo-requirement that the low-price "leg" of discrimination must be in interstate commerce.

This Court erroneously, and in derogation of statute, has engrafted into Section 2 of the amended Clayton Act a pseudo-requirement that the low-price "leg" of discrimination must be in commerce to be actionable. This false requirement is typified by the following statement which appears in the opinion (Op. p. 9):

"Here, although Mead was engaged in commerce, the sales made in the course of such commerce were not the means for the elimination of the local competitor. The means for the achievement of the local purpose did not extend beyond state lines."

This misstatement and misapplication of the statute is the erroneous basis upon which this Court has reversed the sound judgment of the District Court.

No recognition of the specific commerce-power provisions of Section 2 of the amended Clayton Act appears in the present opinion (38 Stat. 730; 49 Stat. 1526, 15 U. S. C. A. § 13). This is crucial. For, unless there be judicial recognition of the *new and different* steps Congress took in 1914 and in 1936, there can be no effective implementation of the national policy Congress *specifically* embodied in Section 2 of the Clayton Act and its Robinson-Patman amendment.

The present opinion totally fails to recognize that the commerce *means* employed in Section 2 of the *amended Clayton*

Act is entirely *different* from other anti-trust statutes. Nevertheless, it is an established legislative fact that the commerce provisions of the amended Clayton Act are *clear, distinct, and constitutional*.

It is pertinent here to set forth the elements of the appellee's case contained in the congressional enactment of Section 2 (a) of the Clayton Act as amended. The material parts of Section 2 are as follows (38 Stat. 730; 49 Stat. 1526, 15 U. S. C. A. § 13):

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce*, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *and where the effect of such discrimination may be* substantially to lessen competition or tend to create a monopoly in any line of commerce, or *to injure, destroy or prevent competition with any person who * * * grants * * * the benefit of such discrimination * * **" [Emphasis added.]

The application of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U. S. C. A., Sec. 13 (a)) has been well outlined by the Assistant General Counsel of the Federal Trade Commission. As he points out, under the statute, the plaintiff's

"case in chief consists of showing (1) a price difference; (2) in the sale of commodities of like grade and quality; 339 (3) with at least *one leg of the discrimination in interstate commerce*; (4) that the commodities are for use, consumption, or resale within the jurisdiction of the United States; and (5) that the effect of the discrimination upon competition 'may be' that specified in the statute." (Dawkins, *Geographic Price Discriminations*, 37 Geo. L. J. 217 (1949); emphasis added.)

This Court has recognized, as indeed it must, that "Mead was engaged in interstate commerce and by selling bread in Santa Rosa, New Mexico, below costs it discriminated against its plaintiff-appellee" (Op. p. 2).

The Court stated that Mead "discriminated in price between the purchases of bread in Santa Rosa and those made in Texas, so that at least some of the purchases made in the discrimination were in commerce" (Op. p. 7).

The Court further recognized that Mead's price discrimination in selling bread in Santa Rosa at low prices eliminated the appellee as a competitor of Mead's Fine Bread Company in Santa Rosa, and that such injury to a "competitor victimized by the

discrimination" is an injury to "competition" within the meaning of the Act (Op. pp. 4-5).

Thus, in self-contradiction, this Court in *reversing* the judgment for the appellee, *has held that the appellee established all the statutory elements of his case!* Clearly, therefore, the appellee is entitled to recover money damages from Mead and the judgment below should be affirmed—not reversed.

One may therefore inquire, how is it possible that the present opinion reaches its *drastic* conclusion? How is it possible that this opinion *reverses* a judgment which obviously complies with the specific commerce requirements laid down by Congress?

The answer to these questions is fundamental. That answer can rest only in the Court's failure to grasp the distinct method by which Congress employed the commerce power in Section 2 of the amended Clayton Act. There is, indeed, much of the basic statute and its vivid legislative history that the opinion completely overlooks.

The year 1914 is important here. In that year Congress adopted new machinery to stamp out *local* price cutting. It was on January 20, 1914, that President Woodrow Wilson delivered a special address to a joint session of the two Houses of Congress, calling for a new legislation which was to become known as the Clayton Act. He said:

"* * * it is now plain what the opinion is to which we must give effect in this matter. It is not recent or hasty opinion. *It springs out of the experience of a whole generation.*

* * * * *

"These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute * * *" (XVII Messages and Papers of The Presidents, Bur. Nat. Lit. 7914, 7916, 7918; emphasis added).

On May 6, 1914, Mr. Clayton, Chairman of the Committee on the Judiciary, House of Representatives, submitted a report upon a new bill (H. R. Rep. No. 627, 63d Cong., 2d Sess. (1914)). This was the first version of what was to become the Clayton Act. His report states in part (p. 7):

"Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain * * * concerns have heretofore endeavored to destroy competition and render unprofitable the business of competitors *by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country* * * * In

the past it has been a most common practice of * * * combinations engaged in commerce * * * to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition. [Emphasis added.]

Congress outlawed the act of discrimination in order to reach blanket price cutting in local areas by national concerns. As the Second Circuit stated in *Mennen Co. v. FTC*,¹ 288 Fed. 774, 778-779 (2d Cir., 1923) :

"* * * prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering the prices * * * in a particular locality in which their competitors were operating * * * Such lowering of prices was maintained within the particular locality while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the smaller rival was driven out of business * * * The Clayton Act was aimed at that evil."

Manifestly, territorial price discrimination was the principal target of the Congress of 1914. Congress sought to afford protection to small local sellers competing with large national sellers. This remedial legislation—Section 2 of the Clayton Act—was placed in our federal statute books to prevent the use of the potent weapon of geographical price cutting. In the Clayton Act federal power reaches this illegal practice by declaring territorial price discrimination to be unlawful.

The history of Section 2 of the Clayton Act demonstrates that price cutting by an interstate firm such as Mead, in a local area where a small competitor not engaged in commerce is doing
342 business, was the very evil which Congress took positive steps to prevent.

This new machinery was further expanded by the Robinson-Patman Act in 1936.

By the specific provisions quoted above, for the first time Congress fashioned legislation to prohibit—

"discriminations between interstate and intrastate customers, as well as between those purely interstate. Discriminations in excess of sound economic differences involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them. When granted by a given seller to his customers in other States, and denied to those within the State, they involve the use of that interstate commerce to the burden and

¹ Despite its recognition of legislative history in the Mennen Case, the Second Circuit failed to give full effect to the statute. The case was later overruled in *Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 73 L. Ed. 311 (1929), holding that "any line of commerce" included the line of commerce engaged in by purchasers as well as that engaged in by the seller.

injury of the latter. *When granted to those within the State and denied to those beyond, they involve conceivably a directly resulting burden upon interstate commerce with the latter. Both are within the proper and well-recognized power of Congress to suppress.*" (Sen. Rep. 1502, 74th Cong. 2d Sess. (1936), 4, 5; emphasis added.)

A clearer statement of the intent of Congress to prevent price discriminations in intrastate commerce by interstate firms can hardly be imagined.

After making the same comment as above, the report of the House Committee on the Judiciary added that the clause:

"* * * is of first importance in extending the protection of this bill against the *full evil of price discrimination, whether immediately in interstate commerce or intrastate commerce*, wherever it is of such character as tends directly to burden or affect interstate commerce" (H. R. No. 2287, 74th Cong., 2d Sess. (1936) 8; emphasis supplied).

The Senate Committee report quoted above was referring specifically to the precise language of Section 2 of the Clayton Act as amended. Yet the present opinion *completely misses the significance* of the federal machinery set forth in the statute and analyzed by the Senate Committee.

Under this statute, the very minute a concern sells the same product at a *higher* price in interstate commerce and at a *lower* price in a *local* area, it has commenced to violate Section 2 of the amended Clayton Act and *federal commerce power has intervened*. This, exactly, is the machinery adopted by Congress. This, exactly, is what occurred in the case at bar. This, exactly, is what the Senate Committee plainly stated. Yet, this, exactly, is what the present opinion *entirely overlooks*.

When the appellant, Mead's Fine Bread Company, was shipping in interstate commerce at a *higher* price and selling at Santa Rosa, New Mexico at a *lower* price, it was in *direct violation* of the *direct provisions* of Section 2 of the amended Clayton Act. It had adopted this means, this discrimination, to the injury of a competitor.

In the terms of the Act, and in the terms of the Senate Committee report, federal commerce power is directly invoked here *because* the appellant "granted" a low price in Santa Rosa, New Mexico, and discriminatively "denied" the same low price to purchasers in interstate commerce. Thus the higher price maintained across the New Mexico-Texas line cast an illegal burden upon interstate commerce. This burden established a violation of a federal statute—Section 2 of the amended Clayton Act. This is the discrimination *forbidden* by statute. And the plaintiff was entitled

to a recovery as a person injured because of this statutory violation (15 U. S. C. A. § 15).

Every price discrimination involves two "legs"—at least two sales, or series of sales, at different prices. If *one* of those two "legs" is in interstate commerce Section 2 of the amended Clayton Act becomes operative. This is the machinery which the present opinion so *completely overlooks* in its misconception of
 344 this fundamental legislation so important to the public interest.

The application of the statute to cases of territorial price discrimination is abundantly clear. It was well recognized not only in the Senate, but in the House of Representatives in 1936. Congressman Utterback, the manager of the bill in the House, clearly stated the effect of the statute:

"Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, *nor may he favor his local trade to the injury of his interstate trade.*" (80 Cong. Rec. (1936) 9559; emphasis added.)

That is precisely what occurred in the case at bar. A burden was imposed upon interstate commerce by Mead. *The high price "leg" in interstate commerce tended to help Mead carry on its local price war.* Moreover, Mead's interstate customers were entitled to the low prices offered in Santa Rosa. So, Section 2 of the amended Clayton Act clearly applies. A distinct violation has occurred, and the District Court so found.

But now, the present opinion casts an anachronistic shadow across this vital area of federal legislation. For this opinion nullifies the specific efforts of Congress, commenced in 1914, to outlaw local price cutting by interstate concerns. Until the present opinion was handed down, it was perfectly clear to all *that this particular statute prohibits local price cutting by any concern when one "leg" of the price differential is in interstate commerce.*

Under the plain terms of the statute passed by Congress, it was, and still is, illegal either to favor or to burden interstate commerce. As an indisputable matter of fact, in the case at bar, interstate commerce was burdened by the high price "leg" of the discrimination, and this higher price tended to support a local price war.

Thus, the discrimination of the appellant was brought
 345 within the sweep of the statute, firmly within the constitutional grasp of the commerce power of the Federal Government.

As the American Law Institute monograph states:

"It is unsafe for a seller partially engaged in interstate commerce to assume that his *intrastate* pricing policies are without

the scope of the Act, *even where only intrastate competition appears to be involved*. There is always the possibility that the lower of his intrastate prices will be held to be supported *in part* by the higher prices charged interstate purchasers; and *this would undoubtedly be the case if such a seller should lower his price throughout an intrastate area to meet (or beat) local competition.*" (A. L. I., Price Discrimination, Austin (1950) 17; emphasis added.)

It has been perfectly clear from the beginning that Congress exercised its commerce powers to the *utmost* in enacting this sound statute aimed at stamping out the evil practice of local price cutting. Thus in 1914, in its report on the original Clayton Act, the House Committee on the Judiciary stated:

"In seeking to enact section 2 into law we are * * * dealing * * * with a real, existing, wide-spread, unfair and unjust trade practice that ought at once to be *prohibited in so far as it is within the power of Congress to deal with the subject.*" (H. R. Rep. No. 627, 63d Cong., 2d Sess. (1914), 9; emphasis added.)

Federal power attaches under Section 2 of the amended Clayton Act if there are but *two* sales at different prices, *one* of which is in interstate commerce. See *Bruces Juices v. American Can Co.*, 330 U. S. 743, 755, 91 L. ed. 1219, 1228 (1947). For "discrimination" under the Act is a bundle or unit consisting of a high price "leg" and a low price "leg." By statute Congress has required that these two "legs" be considered as a unit. They cannot be

separated, for once they are separately considered there is
 346 no "discrimination." In its present opinion this Court looks only to the low price "leg" and has forgotten the high price "leg" which is an integral part of the discrimination. Thus, this Court completely overlooks the well established statutory law that federal power attaches if either "leg" of the discrimination is in interstate commerce. For without *two* "legs," there could be no discrimination. And by the plain terms of the statute, the Act is violated if "either" is in interstate commerce.

Manifestly, the case at bar involves the exact factual situation contemplated by Congress and enacted into law. In the case at bar the high price "leg" of Mead's discrimination is in interstate commerce, and the low price "leg" of the discrimination is intrastate. The language of the statute applies—"where *either* or any of the purchases involved in such discrimination are in commerce." At bar many of the "purchases involved in the discrimination" are in the New Mexico-Texas commerce. These constitute the high price "leg" of the discrimination and bring Mead within the sweep of the statute.

The Supreme Court in *Corn Products Ref. Co. v. FTC*, 324 U. S. 726, 745, 89 L. ed. 1320, 1335 (1945), stated the exact com-

merce application of Section 2 of the amended Clayton Act to the case at bar when it said:

"* * * some of petitioners' sales to other companies, to whom these allowances were not accorded [the high price leg], were made in interstate commerce; thus there was a discrimination against sales in interstate commerce * * *" So in the case at bar.

But the present opinion drives the law back to pre-Clayton days. Here there is a *startling divergence from the clear statutory provisions on interstate commerce*, a wide drift from the contemporaneous legislative reports. Those reports of Congress make the whole purpose of the legislation abundantly clear even in these days when the reasons for enactment of Section 2 of the
347 amended Clayton Act may not always be remembered.

In the most definite and certain terms our Federal Government has declared by statute that *interstate commerce is involved* in the exact factual situation found in the case at bar. Section 2 of the amended Clayton Act squarely prohibits Mead's Fine Bread Company from maintaining two different prices when one price "leg" is in interstate commerce.

In derogation of statute, the present opinion effectively repeals a major portion of Section 2 of the amended Clayton Act by holding that interstate commerce is not involved in cases such as that at bar. This ruling has arisen despite the painstaking declaration and demonstration by Congress, step by step in the statute, outlining exactly how *interstate commerce is directly involved in such cases of local price discrimination*.

In disregard of the specific terms of the statute, the present opinion has engrafted a *pseudo-requirement* upon Section 2 of the amended Clayton Act, *that the sales going into the local area of the price war must themselves be in interstate commerce!*

The opinion exposes this complete misconception of the statute in stating (p. 9):

"In those cases, interstate commerce was the forbidden means for the achievement of the local purpose. Here, although Mead was engaged in commerce, the sales made in the course of commerce were not the means for the elimination of the local competitor. The means for the achievement of the local purpose did not extend beyond state lines."

This dangerous error is destructive of the statute. It ignores the clear language of the statute which provides that only *one* "leg" of the discrimination need be in interstate commerce—"where either or any of the purchases involved in such discrimination are in commerce" (49 Stat. 1526, 15 U. S. C. A., § 13 (a)).

Manifestly, the existing opinion makes it possible for a concern with one plant only—a plant in State A—to get away with a price war in State A while shipping at higher prices into

348 States B, C, and D. This shocking result follows because of the opinion's ruling that "the sales made in the course of such commerce were not the means for the elimination of the local competitor" (Op. p. 6). This Court, in holding *contrary to statute* that the low price "leg" of the discrimination has to be in interstate commerce, has unwarrantedly opened up a field for price discrimination *in its home state* by every concern, and by incorporating in more than one state it may increase the field for such discrimination, contrary to the express terms of the Act of Congress, this Court now authorizes such a concern to burden interstate commerce with discriminatively high prices to its heart's content. This breach in the dike has occurred because this Court has treated price discrimination as having only one "leg," the low-price "leg." But Congress has enacted a statute outlawing discrimination, which *necessarily* has *two* "legs." The present opinion can reach this strange result only by refusal to consider both "legs" as necessary to constitute "discrimination" under the terms of the statute. This Court thus erroneously adopts the nonstatutory view that the low price "leg" at the point of the price cut must be in commerce and that it makes no difference that the high price "leg" is in commerce. The statute is specifically to the contrary.

The words of the statute and the legislative history of the Clayton Act make it plain that no such incongruous result can be upheld (H. R. Rep. No. 627, 63d Cong. (1914) 9; S. R. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 4, 5). Obviously, the present opinion on Section 2 of the Clayton Act can stand only so long as there continues to exist a complete misconception of the manner in which Congress employed federal machinery under the commerce power.

II

This Court erroneously engrafts upon Section 2 of the amended Clayton Act the pseudo-requirement that the competitive injury resulting from a violation of the Act must be in interstate
349 commerce.

The magnitude of the error of the present opinion is aggravated by the imposition of a second nonexistent requirement as to interstate commerce. This Court engrafted upon the statute the pseudo-requirement that the competitive injury—the plaintiff's injury—must be in commerce. This Court then reversed the judgment below because plaintiff-appellee had not met this false requirement. The opinion, advancing into its second major error, states (p. 7):

"But there is *positively no evidence that the discriminatory sales had even the probable effect of lessening competition or tended to create a monopoly in any line of commerce, or to destroy*

no present competition with Mead at any place except Santa Rosa, New Mexico, or any of its customers at any of its customers at any place in the United States except Santa Rosa. The sales made at Santa Rosa were to purchasers for resale locally. The competitive injury resulting from the sale was to a purely local competitor whose business was in no way related to interstate commerce. If competition was lessened or a monopoly created, it was purely local in its scope and effect and in no way related to or affected interstate commerce. The suppressive effect of the discriminatory sales on competition at Santa Rosa, reprehensible as they may have been did not reach beyond the jurisdiction of New Mexico and cannot therefore be found to be within the "effect" provisions of 13 (a) of the Clayton Act, as amended." (Emphasis added.)

The foregoing amazing and incredible proposition obviously finds its root in this Court's failure to apply a disregarded provision of Section 2 of the amended Clayton Act. It will be observed that this portion of the opinion omits all reference to the controlling words of the statute and refers only to those words which are found in the most restrictive alternatives of the "effect" clause. Specifically, the opinion here completely ignores the controlling words—

"where the effect of such discrimination may be . . . to injure . . . competition with any person who either grants or knowingly receives the benefits of such discrimination . . ."

(49 Stat. 1526; 15 U. S. C. A. § 13 (a); emphasis added).

The requirements of the statute are in the alternative:

- (1) "Where the effect of such discrimination may be substantially to lessen competition,"
- (2) "or tend to create a monopoly in any line of commerce,"
- (3) "or to injure, destroy, or prevent competition,"
- (a) "with any person who either grants" [such discrimination],
- (b) "or knowingly receives the benefit of such discrimination,"
- (c) "or with the customers of either of them."

It is submitted that plaintiff has met the requirements of (1), (2), and (3) (a), and any one of them would be enough. The Court decided otherwise with regard to (1) and (2), but it apparently overlooked (3) (a). Certainly there is ample evidence that the discriminatory prices tended to injure, destroy or prevent competition with Mead, who granted the discrimination.

There is absolutely no requirement in the statute that the competitive injury to the plaintiff-appellee be concerned with interstate commerce. Moreover, there is no requirement that he be in interstate commerce. In the clearest terms, Section 2 of the amended Clayton Act merely requires that the injury "may be" to "competition" (Mead, the plaintiff appellee) "with any person

(Mead, the defendant appellant) who * * * grants such discrimination * * *."

351 It is strange, indeed, that the opinion disregards these controlling words and proceeds to write into the statute a second false commerce requirement for which there is no warrant and no need. Congress enacted Section 2 of the amended Clayton Act *without any requirement* that the injury resulting from the sale in the lower price "leg" of the discrimination involve interstate commerce or that the injured party be in interstate commerce. When Mead charged a higher price in the interstate "leg" of its discrimination, it was illegally burdening interstate commerce. It thereby violated the Act, for the "effect" of its discrimination was to "injure" Moore who was "competition."

Mead thus fell within the sweep of the federal commerce power as specially applied by Section 2 of the amended Clayton Act. Mead's discrimination involved a high price "leg" in interstate commerce and a low price "leg" locally. All the statute requires is that the "effect may be to injure" the appellee, Moore. That he was so injured is unquestionably established, and the District Court so held. Even this Court admits the injury, yet fails to apply the statute.

Federal power having attached, it is within the province of Congress to declare what the consequences of Mead's violation of federal law shall be. Those consequences are the damages provided in Section 4 of the Clayton Act (15 U. S. C. A. § 15) as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found * * *."

Under Section 4 of the Clayton Act quoted in part above, Mead, having indulged in illegal price discrimination, was liable for *any damages* arising at *any point*, local or otherwise, in connection with the discrimination. This legal truth cannot be changed by writing false commerce requirements into the "effect" clause of the statute.

352 Only enough, a case remarkably similar to the one at bar, and which arose under Section 2 of the Clayton Act, finds no mention in the present opinion. In *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir., 1929), American was selling Lucky Strike cigarettes in Porto Rico at a price which resulted in their being retailed at 15 cents a package, but which increased to 18 cents for a short period because of a new tax on cigarettes in that particular price bracket. The Porto Rican company was selling its Casino cigarettes at 12

cents a package. Then American reduced the price of Lucky Strikes in Porto Rico so as to sell at 12 cents per package. American did not reduce its prices for Lucky Strikes in other areas. Thereafter, the Porto Rican Company reduced the price of its Casino brand so as to sell at 10 cents per package. The Porto Rican company brought suit against American for an injunction under Section 2 of the Clayton Act, charging that territorial price discrimination resulted from American's blanket price cut in a local area—Porto Rico.

The plaintiff's cigarette sales were wholly intrastate, being confined to Porto Rico. However, the defendant was engaged in commerce, since it shipped cigarettes across state lines in the United States. The Second Circuit properly held that under Section 2 of the amended Clayton Act the commerce requirements of the statute were met on the basis of the *defendant's* sales in commerce. It was completely immaterial and without significance that the plaintiff was not in interstate commerce, so long as the defendant was.

It is equally immaterial in the case at bar.

III

Not only has this Court contravened the statute, but it has gone beyond all case law in arriving at its drastic result.

At bar the best and controlling authority is the statute duly enacted by Congress—Section 2 of the Amended Clayton Act.
353 This is the solemn law of the land, and by the Constitution it will be implemented and enforced by the courts.

However, in overlooking significant provisions of the statute in the present opinion, this Court at the same time refers to a number of decisions which it distinguished from the case at bar. Upon this basis of comparison and distinction of certain decisions, it appears that this Court found it possible to reach its drastic conclusion reversing the sound judgment of the District Court. It is pertinent, therefore, briefly to examine the validity of such comparisons and distinctions.

A. The Sherman Act Cases Do Not Justify the Court's Opinion.

Study of *Manderline Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 92 L. ed. 1328 (1948), *Lorain Journal Co. v. United States*, 342 U. S. 143, 96 L. ed. 162 (1951), and all the other cases cited by the Court, makes it abundantly clear that there is nothing in those cases contrary to the judgment of the District Court based upon the exact terms of Section 2 of the amended Clayton Act. Indeed, in a general way those cases support the judgment.

Moreover, in looking to Sherman Act precedents in a Clayton Act case such as that at bar, this Court has forgotten to look at the specific interstate commerce provisions of Section 2 of the amended Clayton Act. The new commerce machinery of the Clayton Act is *entirely different* from anything found in the Sherman Act. In the Clayton Act, Congress has declared the exact method in which interstate commerce becomes involved and the formula under which federal power attaches to local price cutting in cases such as that at bar.

This specific interstate commerce machinery of the amended Clayton Act requires recognition and enforcement. Yet the present opinion of this Court utterly ignores these vital provisions of a federal statute. Moreover, the Sherman Act's requirements as to effect on commerce are much greater than the Clayton Act's.

B. The Atlantic Ice Case Is Not Controlling in Any Way Since No Interstate Commerce Was There Involved and a Different Statute Was Concerned.

354 It is odd to find this Court stating such an obvious error as that "Our case is indistinguishably similar to *Atlantic Co. v. Citizens Ice & Cold Storage Co.*, 178 F. 2d 453 * * *" (Op. p. 7).

The Atlantic Ice case affords *no* support whatsoever for the present opinion. Reliance thereon by this Court is erroneous, both factually and legally.

In the first place, the Atlantic Ice case *did not involve any interstate commerce* (178 F. (2d) at 455, 456, 457). There was *no* high price "leg" of any discrimination in interstate commerce. This is a fact standing in sharp contrast to the record in the case at bar. In the Atlantic Ice the closest the plaintiff could come to a high price "leg" in interstate commerce was a few local sales to railroads and truckers. These were not sales in commerce such as found in the case at bar, and this Court in stating to the contrary has misstated the facts of the Atlantic Ice case.

Secondly, and even more strangely erroneous, this Court speaks of the Atlantic Ice case as involving "the Sherman or Clayton Acts." (Op. p. 7). The Clayton Act was *not* involved in the Atlantic Ice case at all. An *entirely different* statute was before the Court in that case. The statute invoked in that case was the Borah-Van Nuys bill which is a separate statute enacted in conjunction with the Robinson-Patman Act in 1936 (15 U. S. C. A. § 13a). It is not, and never has been, a part of the law which amended the Clayton Act. The Borah-Van Nuys bill is sometimes loosely referred to as a part of the Robinson-Patman Act, and this undoubtedly led this Court into an inadvertent, yet drastic, error.

Obviously, the Borah Van Nuys part of the Robinson Patman legislation has nothing whatsoever to do with Section 2 of the Clayton Act as amended by the Robinson-Patman Act. Those two are entirely different statutes containing entirely *different* provisions. The Borah-Van Nuys legislation does *not* contain the interstate commerce machinery found in Section 2 of the amended Clayton Act.

This Court's opinion calls the Atlantic Ice case 355 "indistinguishably similar" to the case at bar, despite the fact that *no* interstate commerce appeared in that case and despite the fact that Section 2 of the amended Clayton Act was *not* involved or considered.

C. The Present Opinion Stands Directly Contrary To This Court's Own Prior Opinion Upon Interstate Commerce.

Having decided erroneously in the first instance that interstate commerce was not involved in the case at bar (184 F. (2d) 338, 340) on reconsideration at the direction of the Supreme Court of the United States this Court held that interstate commerce was involved under the clear provisions of Section 2 of the amended Clayton Act and that only the question of competitive injury remained open.

Upon retrial the plaintiff-appellee proved all the *facts*, and more, relied upon by this Court to show compliance with the interstate commerce provisions of the Act. It is therefore undeniable that this Court has now disagreed with itself.

The two opinions are poles apart and cannot be squared with each other. Even if this Court now elects to disregard the *law of the case* previously established and *under which this cause was retried*, it has taken an erroneous position which should be corrected with or without reference to the prior decision. As fully developed herein, the present opinion is erroneous on its face and should not be permitted to become the final word of this Court.

IV

The Court erred in holding unconstitutional the application of the Robinson Patman and Borah-Van Nuys Acts to intrastate transactions by persons engaged in interstate commerce, unless interstate commerce is directly involved.

This Court has held in effect that the Commerce Clause of the Constitution does not give Congress the power to forbid intrastate price discriminations by persons engaged in interstate 356 commerce, unless interstate commerce is involved directly.

This is an error of major proportions, for the power of Congress to regulate interstate commerce and those engaged in it is plenary. The problem of the courts is to determine how much of this power Congress has exercised in each legislative enactment.

As the Supreme Court has said in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 624, 81 L. ed. 893, 108 ALR 1352,

"The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of the 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement' (*The Daniel Ball*, 10 Wall. 557, 564, 19 L. ed. 939); * * * although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is *essential or appropriate* to protect that commerce from burdens and obstructions, *Congress cannot be denied the power to exercise that control.*" [Emphasis supplied.]

Congress has determined that there is a burden upon interstate commerce when a person or firm engaged in it cuts prices in intrastate commerce while holding them up in interstate transactions. This burden may be great or small, depending on the circumstances, but, in the words of the Supreme Court, Congress has found it "essential or appropriate" to prevent such burdens.

In a number of other cases the Supreme Court has upheld the power of Congress to regulate intrastate transactions having an effect or potential effect on interstate commerce. Some of 357 them are summarized in *Huston East and West Railway Company v. United States*, the "Shreveport cases," 234 U. S. 342 (1914), in which the Supreme Court upheld the power of Congress to regulate intrastate rates of railroads which were also engaged in interstate commerce, so as to prevent the former from placing a burden upon the latter.

Even in *A. L. A. Schechter Poultry Corporation v. U. S.*, 295 U. S. 495, 55 S. Ct. 837 (1935), where the particular act involved (the National Recovery Act) was held invalid, the Supreme Court said (p. 593):

"* * * The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations * * * And combinations and conspiracies to restrain interstate commerce or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act because the conspirators seek to attain their end by means of intrastate activities."

Directly, or by necessary implication, this Court has held § 13 (a) and 13a unconstitutional insofar as they forbid intrastate price discriminations by *levies* engaged in interstate commerce, saying at p. 6 of its opinion,

"But, whether the claim is asserted under the Sherman Act or the Clayton Act, as amended, the wrongs complained of must involve interstate commerce, either in 'effect' or 'purpose', for obviously, the acts can have no greater potency than the commerce clause itself."

"Effect," of course, refers to § 13 (a), and "purpose" refers to § 13a, although, as we have pointed out above, the latter is not really part of the amended Clayton Act.

After holding that the plaintiff had proved a case within 558 the "literal language" of § 13a, the Court said at pp. 8, 9:

"But the statute must be kept within the constitutional power of Congress to regulate commerce. It follows then, to be constitutionally actionable under 13a, interstate commerce must be monopolized or utilized to effectuate the objective. In other words, the means employed for the elimination of the purely local competitor must, in some effective way, reach beyond state boundaries."

Both of these statutes rest upon the power of Congress to prohibit the use of higher prices in interstate commerce to offset losses sustained in local price wars, for therein lies the burden on interstate commerce. This is the fundamental which the Court has failed to grasp.

Further, this Court for some inexplicable reason has failed to realize the full implications of the appellant's interstate combination of corporations, the interlocking directorates, common ownership, common management, common advertising programs, common purchasing arrangements, and use of a common trade name. It is this aspect of the fact situation that conclusively impelled appellant into interstate commerce if there had been any doubt that its sales between Clovis, New Mexico, and Farwell, Texas had failed so to label it. It was the combined power of these various corporations, some in New Mexico and some in Texas, that was brought into play in order to force the appellee from business in Santa Rosa, New Mexico. Appellant and its allied corporations functioned as a unit, each was dependent on the other, each received aid and assistance from the other. In fact it is admitted that the Lubbock bakery supplied the Clovis bakery during breakdowns (R. 142). This is contrary to the opinion writer's statement (Op. p. 10). Further, it is not disputed that the price of sliced white bread, before the price discrimination went into effect, in *all* of Eastern New Mexico and West Texas,

that area covered by appellant's interstate combination, at wholesale sale was fourteen cents for the pound loaf and twenty-one cents for the pound and a half loaf (R. 47). Yet appellant using its interstate power in this region cut the price to seven and eleven cents respectively, such being below cost of production, and the cut applied only at Santa Rosa while maintaining the higher prices in the rest of its Eastern New Mexico-West Texas area (R. 48). It is plain that we have here a low price "leg" in Santa Rosa, New Mexico, and a high price "leg" in all the rest of the interstate combination's two state regions. How then can it be said that there was no "interstate character" to the transaction? (Op. p. 10.)

It requires no legerdemain to conclude that the interstate combination made possible the maintenance and actively fostered the success of the low price "leg" operation that would inevitably result in driving appellee out of business, and, thus, extend still further appellant's objective of excluding competition and creation of a monopoly in Eastern New Mexico and West Texas. While it is true that the interstate shipments from Clovis, New Mexico, to Farwell, Texas, were the most intimate examples of discrimination on the part of appellant corporation as an isolated entity, the broader view of the interstate combination of corporations reveals the "effect" and defines the "purpose" as being contrary to the clear intent of the Congress. To cast aside the facts of an interstate combination such as this disregards a main confirming facet of the entire case, because all of the sales of the combination were, thus, in interstate commerce. It is not possible or proper to segregate the sales from the admittedly interstate combination's operations other than sales. *F. T. C. v. Cement Institute*, 333 U. S. 683, 695-6, 68 S. Ct. 793, 800-1. In this last mentioned case the Supreme Court, in talking about the jurisdiction of the Federal Trade Commission with respect to multiple basing point system of sales of the defendants under § 2 of the Clayton Act as amended, said:

"The Commission found that 'Northwestern Portland makes no sales or shipments outside the State of Washington,' and that 'Superior Portland, with few exceptions, makes sales and shipments outside the State of Washington only to Alaska.'"

"The fact that one or two of the numerous participants in the combination happen to be selling only within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction. The important factor is that the concerted action of all of the parties to the combination is essential in order to make wholly effective the restraint of commerce among

the states. The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. We hold that the Commission did have jurisdiction to make an order against Superior Portland and Northwestern Portland."

Even if there had been no interstate shipments from New Mexico to Texas, we would still be confronted with an *interstate combination* astride the New Mexico-Texas boundary selling bread below the cost of production in New Mexico and at a profit in Texas. Surely, such an interstate combine's sales to purchasers in the respective states involve discriminations which are in interstate commerce even as are the rest of its activities in interstate commerce. To say otherwise would be to permit the very activity the danger of which Congress desired to prohibit. To treat them all as other than one corporate entity is to close one's eyes to the obvious.

V

The Court erred in requiring evidence of the "probable effect" of the discriminatory sales on interstate commerce or competition.

As for there being "positively no evidence" regarding the
361 "probable effect" of the discriminatory sales, as the Court stated at p. 7 of its opinion, it is submitted that this effect was not susceptible of proof of the sort the Court evidently had in mind, and *the Supreme Court has held that it should not be required.*

In *F. T. C. v. Morton Salt Co.* (1948), 334 U. S. 37, 68 S. Ct. 822, 830, the Supreme Court said:

"It would greatly handicap effective enforcement of the [Robinson-Patman] Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers * * *"

And in the instant case, we have a practice that is monopolistic *per se*—selling below cost in one small area while holding prices up elsewhere. With the facts before it, the jury was competent to determine the "probable effect" of such practices—or, to be more exact, what the effect *might* be. The statute requires no "probable" effect; the exact language is "where the effect * * * may be," etc.

In view of the Morton Salt case and the uncontroverted character of the evidence, it probably would not have been error for the trial judge to have instructed the jury that discrimination had

been proved and that the statutory requirements as to effect or tendency had been met. However, the trial court left these matters to the jury to decide, and it decided them in favor of the plaintiff. To reverse their verdict amounts to substituting this Court's findings of fact for the jury's, in a case in which there was no real controversy concerning the main facts.

This Court found no fault with the instructions to the jury, yet if the statement that there was "positively no evidence" is taken literally the court below would have erred in submitting the case to the jury at all! But appellant did not raise this question. Its Point I states that "the evidence shows that the alleged illegal act did not have the effect and could not have had the probable effect of substantially lessening competition or tending to create a monopoly," certainly a gross overstatement of the Act's requirements, but the argument which follows does not touch top, bottom, or sides of the proposition stated. The burden of the argument is that competition was not injured because appellant was not a real competitor of Mead. No alleged error of the trial court was pointed out. This Court has certainly searched the record to raise the point on which it decided the case. Incidentally, even the proposition stated in appellant's Point I presupposes the existence of *some* evidence on the point.

VI

The law of this case is that plaintiff-appellee had pleaded and proved a prima facie case in the first trial, and defendant-appellant introduced no evidence in the second trial to refute this.

Although the opinion of this Court goes to some pains to declare otherwise, it is impossible to see how its former decision could fail to mean that the plaintiff had pleaded and proved a prima facie case in the first trial. It must be kept in mind that *in the first trial the complaint was dismissed at the conclusion of the plaintiff's case in chief*. If he had not pleaded and proved a prima facie case at that point, it was too late for him to do so, and this Court would have no reason to remand the case for a new trial.

Presumably the new trial was ordered because the defendant was yet to be heard and might conceivably refute this prima facie case. This the defendant failed to do, and neither this Court nor counsel for appellant has pointed out any evidence in the record which would have even a tendency in this direction.

The fact is that plaintiff's case was even stronger in the second trial. The pleadings were amended to emphatically allege that everything defendant did was in interstate commerce because it was operated as a common enterprise with certain other corporations in Texas and New Mexico, through interlocking directorates, common management, common majority stockhold-

ers, a common trade name, a common advertising program, and common purchasing arrangements. This evidence had been barred in the first trial on the ground that it was not specifically pleaded, but it was pleaded and proved to the hilt in the second trial. And, incidentally, it *was* proved (R. 142) that the Lubbock, Texas, bakery did on some occasions ship bread to the Clovis, New Mexico, bakery, despite the statement in the Court's opinion to the contrary (p. 10).

In view of the holdings of the Supreme Court that even information, intercourse and communication between persons are commerce, it is difficult to see how the above-mentioned facts can be brushed off so lightly. In *International Textbook Company v. Pigg*, 217 U. S. 91, 107, 30 S. Ct. 481, 485, it was held that—

"intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states within the meaning of the Constitution, especially where * * * such intercourse and communication really relate to matters of regular, continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business."

See also *U. S. v. South Eastern Underwriters Assn.*, 322 U. S. 533, 550, 551, 65 S. Ct. 1162, 1172 (1944), where, in holding insurance companies subject to regulation, the Court said,

"No commercial enterprise of any kind which conducts its activities across state lines has been held 'to be wholly beyond the regulatory power of Congress under the Commerce Clause.'"

According to *Am. Jur.*, Appeal and Error, § 1000—

364 "The general rule as to the law of the case applies with regard to questions as to the sufficiency of the evidence; and when the case comes up for review a second time and the evidence is substantially the same, the former decision is conclusive. Thus, a ruling that the evidence on a particular issue was sufficient to go to the jury is conclusive on a second appeal, where the evidence at the second trial was substantially the same as that offered at the first * * * The law of the case applies in determining the sufficiency of the evidence to support a verdict for plaintiff upon a second trial, after a judgment of nonsuit has been reversed upon the ground that the evidence was sufficient to have justified a verdict for plaintiff, unless it is shown that some essential fact or facts proved in the first trial were not proved in the second trial or were conclusively disproved."

The "law of the case" doctrine also applies to "matters necessarily involved in the determination of a question" and to "questions which might have been, but were not, raised or presented on a prior appeal * * *". *Ibid.* § 994, 995.

It is appellee's contention that the question of whether he had established a *prima facie* case was *necessarily involved* in the former decision, and certainly it might have been raised if it wasn't. Actually, the defendant argued all the way to the Supreme Court that there was no effect on commerce.

We refer the Court to pages 10-14 of appellee's brief in chief for a fuller discussion of this point, including numerous citations to cases decided by this very Court.

365

CONCLUSION

The present opinion is glaringly erroneous. This opinion on its face is far more deficient than the first opinion in this cause which this Court found necessary to correct at the suggestion of the Supreme Court of the United States.

In error, the result is a drastic reversal of a sound judgment based upon a sound statute.

It is indisputable that Mead's Fine Bread Company's price discrimination occurred in interstate commerce in violation of the specific provisions of Section 2 of the amended Clayton Act. But this Court erroneously fails to consider that discrimination includes two series of sales or "legs" and disregards the high price "leg" which puts the discrimination into commerce. In so doing this Court, in effect rewrites the statute.

Then this Court moves to the greatest error of all in ruling, contrary to statute, that the "competitive injury" must be in interstate commerce. The opinion, in major error, states (p. 5):

"The competitive injury resulting from the sale was to a purely local competitor whose business was in no way related to interstate commerce."

There scarcely could be a greater misconception of the statute than the Court's statement above. It is crystal clear that the provisions of the statute do not require the plaintiff-appellee's injury to be in interstate commerce; nor do they require the plaintiff-appellee himself to be in interstate commerce. There are *no* such provisions of the statute. Such additional interstate commerce requirements are *not there*, and by the clear legislative history of Section 2 of the amended Clayton Act they were *not intended to be there*.

Therefore, this Court has taken it upon itself to write pseudo-requirements into the statute. This is wrong, for this is in excess of the constitutional function of this Court. The reading into the statute of these foreign requirements was judicial legis-
366 lation. This Court is not empowered to "rewrite the statute."

"Electric Storage Battery Co. v. Shimadzu, 367 U. S. 5, 14, 83 L. ed. 1071, 1078 (1939)."

As the Supreme Court succinctly stated in *United States v. Cooper Corp.*, 312 U. S. 600, 605, 85 L. ed. 1071, 1075 (1941):

"* * * it is not our function to engraft on a statute additions which we think the legislation * * * should have made."

This Court in holding unconstitutional the application of the Robinson-Patman and Borah-Van Nuys acts in this case has taken a view of the interstate commerce power of the Congress that cannot be in any way held consistent with expressions of the Supreme Court heretofore had. It is believed that this Court's ignoring the interstate combination's activities does not do justice to plaintiff's case and creates an impression of the evidence that was directly contrary to that had at the trial.

The evidence submitted in this case goes beyond that had in most cases of this type and nature. The efforts of this Court to require "probable effect" on interstate commerce or competition lies square in the face of sound precedent to the contrary. There can be no question but that the jury's verdict was supported by substantial evidence, and this is further fortified by the fact that the defendant offered practically no evidence at all and certainly none on the issue searched out by the Court in the record.

In the original brief of this case the appellee argued strenuously the application of the doctrine of law of the case. This Court in its opinion has seen fit to pass lightly over this, but appellee's urgently urge the Court to again scrutinize the original brief in that respect and give to this plaintiff the benefit of this doctrine which has application here to its full extent.

The public interest in the Robinson-Patman and Borah-
367 Van Nuys acts is exceedingly great. Suppression of territorial price discrimination is of high public importance. Error has been committed which in its effect will reach far beyond the instant cause. A sound judgment has mistakenly been reversed. This error can best be cured in this Honorable Court. The United States Court of Appeals for the Tenth Circuit. It is respectfully urged that this Court rehear and reconsider this cause, and that the plaintiff-appellee not be forced to carry the cause higher in order to obtain correction of such fundamental errors.

Respectfully submitted.

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CERTIFICATE OF SERVICE

[Omitted in printing.]

368 [File endorsement omitted.]

369 In United States Court of Appeals

[Title omitted.]

Appellant's reply to petition for rehearing.

Filed January 13, 1954

The appellant, Mead's Fine Bread Company respectfully submits herewith a brief reply to appellee's motion for rehearing.

The authorities cited by the appellee do not support the contentions made by him nor does his theory find authority in sound reason. However, it is the desire of the appellant to point out a few of the errors found in the conclusions drawn from the authorities cited by the appellee.

Appellee, at page 11 of this petition, cites and quotes from Corn Products Refining Company vs. F. T. C., 324 U. S. 726, 65 Supreme Court, 961, 89 L. ed. 1320. In support of his position that the sales made by appellant in Farwell, Texas, is sufficient to imply a burden upon commerce by reason of the local price war in Santa Rosa, New Mexico. The portion quoted by appellant fails to support his theory and does not in any manner conflict with the conclusions of this court and a reading of the two sentences immediately preceding appellee's quotation both supports and distinguishes the two cases. We quote the two sentences:

370 "And finally it is said that the Commission was without jurisdiction because the dextrose sold by petitioners to

Curtiss was not found to have been sold in interstate commerce; that if the section is construed to apply to such transactions, it would be unconstitutional; and that in any case there is no showing that the transactions complained of, although not themselves in interstate commerce, have in any way affected such commerce. But the effect upon the commerce is amply shown by the interstate and national character of the Curtiss Company's business; by petitioners' advertising for Curtiss, which was itself frequently in interstate commerce, amounting to \$750,000; and by Curtiss' own admission that it competed in the sale of its candy in interstate commerce, with all manufacturers of one cent and five cent bars of candy."

The court will, of course, recall that the Corn products' case (Supra), among other points, involved the sale of dextrose to

Curtiss Candy Company, who in turn, used the dextrose in the manufacture of candy which it sold on a nationwide basis. A clear distinction arises between this case and the Corn Products' case for the reason that products sold by Mead's Fine Bread Company was not ~~resold~~ into commerce but ~~was~~ consumed in the town to which it was delivered. Another clear consideration is, of course, that the means used in the Corn Products' case by the sale of dextrose to Curtiss Candy Company was certainly calculated to effect interstate commerce.

At page 17 of Appellee's Petition for Rehearing, he states that, "a case remarkably similar to the one at bar" is *Porto Rico American Tobacco Company vs. American Tobacco Company*, 30 F. 2d 234 and goes *on* to intimate that the only commerce involved in that case was the fact that American Tobacco Company "shipped cigarettes across state lines in the United States." Such conclusion is wholly in error and we quote from the court's opinion (30 F. 2d, 235) right hand column, last sentence in paragraph two-thirds down the page:

"The appellant sold in the same market, its brand of 'Lucky Strikes,' manufactured in the United States."

Obviously, if the Lucky Strikes sold in the same market with Porto Rican American Tobacco Company were manufactured in the United States they necessarily moved in commerce to arrive in Porto Rico. Clearly, the case does not support the petition for rehearing and is not even remotely "similar to the case at bar."

At page 19 of Appellee's petition, it is stated that *The Atlantic Company vs. Citizens Ice and Cold Storage Company* 371 (178 F. 2d, 453) did not involve the Clayton Act and insists that only the Borah-Van Nuys Bill was involved. Appellee is in error in this for the reason that the plaintiffs in the Atlantic Company case pleaded specifically acts were "in violation of The Robinson-Patman Act" (178 F. 2d, at page 454). Other references to the Sherman Act and Robinson-Patman Act are made throughout the opinion. We point out the foregoing for the convenience of the court, however, we think that the Atlantic Company case fully supports the conclusion drawn from that case by this court in its opinion that the situation presented is wholly local with no substantial effect upon commerce.

Under his Point IV (Petition, page 20) the appellee cites a number of cases in support of a contention that this court has held that the commerce clause of the constitution does not give Congress power to forbid interstate discrimination by persons engaged in commerce unless interstate commerce is involved directly. Of course, the court has not so held in its opinion, in fact, the opinion

could not in any circumstances lead a person, capable of reading the English language, to draw such a conclusion.

The Appellee attempts to find comfort in a National Labor Relations Board case (page 21, Petition) in *N. L. R. B. vs. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 57 S. C. 615, 81 L. ed. 893 and quotes from that opinion a portion which states that the Congress' authority to protect commerce from burden and obstructions is not limited to transactions which can be deemed a part of the flow, but may legislate on the subject for its "protection and advancement." It is generally accepted that in the Labor Relations Act, Congress intended to exercise to the fullest extent its power over interstate commerce; *International Brotherhood of Electrical Works vs. N. L. R. B.*, 281 F. 2d 34, affirmed in 341 U. S. 694, 71 S. Ct. 954, 103 L. ed. 1299. But even under that Act the act or thing involved must in some practical manner affect commerce. In the Supreme Court in *Polish National Alliance of the United States of North America vs. N. L. R. B.*, 322 U. S. 643, 64 S. Ct. 1196, 88 L. ed. 1509, the court stated:

"When the conduct of an enterprise affects commerce among the states it is a matter of practical judgment, not to be determined by abstract notions."

372 To conclude in the instant case that interstate commerce was substantially burdened or even affected would be an abstract deduction and not a reality.

All of the authorities cited by appellee confirm the correctness of the courts decision in this case either directly or by obvious distinguishing features. Nothing has been cited contrary to any conclusion drawn by the court.

It is respectfully submitted that appellee's petition for rehearing be denied.

Respectfully submitted.

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[Certificate of service omitted in printing.]

In United States Court of Appeals

Order denying petition for rehearing

January 16, 1954

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

On January 27, 1954, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

374 [Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. 545 Misc. —, October Term, 1953

L. L. MOORE, PETITIONER

v.

MEAD'S FINE BREAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE TENTH CIRCUIT

Order Allowing Certiorari

June 7, 1954

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

Petitioner,

vs.

MEAD'S FINE BREAD COMPANY, A CORPORATION,

Respondent

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR THE PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

Petitioner,

vs.

MEAD'S FINE BREAD COMPANY, A CORPORATION,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 326-330) is reported at 208 F. 2d 777. Prior opinions in this cause are reported at 184 F. 2d 338, petition for writ of certiorari granted by Supreme Court, judgment of Court of Appeals vacated and cause remanded, 340 U. S. 944, 71 S. Ct. 528, 95 L. Ed. 681; and at 190 F. 2d 540, petition for certiorari denied, 342 U. S. 902, 72 S. Ct. 290, 96 L. Ed. 675. Petition

for certiorari was granted here in — U. S. —, 74 S. Ct. 877, 98 L. Ed. 727.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254(1). The Judgment of the Court of Appeals was entered on December 11, 1953 (R. 330). Petition for Rehearing was denied on January 16, 1954 (R. 356). The Petition for a Writ of Certiorari was filed on April 14, 1954. The Petition was granted June 7, 1954.

Statutes Involved

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. A. § 13(a), provides in part:

“It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .”

And Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. A. § 13a, provides in part:

“It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell . . . goods in any part of the United States at prices lower than those exacted by said person elsewhere in

the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell * * * goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

And Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. § 15, provides in part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Questions Presented

1. Whether, in a case of price discrimination by a bakery corporation engaged in interstate commerce against a competing local bakery engaged solely in intrastate commerce where the jury and the appellate court found that the high-price leg of the discrimination occurred in interstate commerce and the low-price leg in intrastate commerce a cause of action constitutionally arose under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (38 Stat. 730; 49 Stat. 1526, 15 U. S. C. A. § 13(a)), where the effect may be to injure or destroy or prevent competition with the discriminator, or whether it is necessary that both the low-price and high-price leg of the price discrimination be in interstate commerce and that the injured competitor be in interstate commerce.

2. Whether under the facts stated above, where the purpose of the price discrimination is admittedly one of destroying competition or eliminating a local competitor, to be constitutionally actionable under the Borah-Van Nuys

Section of the Robinson-Patman Act (49 Stat. 1528, 15 U. S. C. A. § 13a), it is necessary that the means employed for the elimination of the competitor, that is, the low price for sale, be in interstate commerce or that interstate commerce be monopolized.

3. Whether it is the law of the case that the pleadings and proof make out a prima facie case for plaintiff, where, after a first trial in which the Complaint was dismissed at the close of plaintiff's case and the cause thereafter was first considered by the Court of Appeals, was remanded by this Court for further consideration, was reconsidered by the Court of Appeals, and certiorari was then denied by this Court, and a new trial was had on substantially identical issues of law and fact, and the cause is again considered by the Court of Appeals on the same issues with a reversal on issues previously argued in that Court and this.

Statement

This action was commenced on March 10, 1949, in the United States District Court for New Mexico. Petitioner, L. L. Moore, here charged Mead's Fine Bread Company, a New Mexico corporation, with price discrimination as between bread sales at Santa Rosa, New Mexico, and interstate sales (R. 5-8).

At the first trial of this action, the District Court dismissed the complaint at the conclusion of petitioner's case in chief. The Court of Appeals for the Tenth Circuit affirmed on the ground that petitioner was in pari delicto, 184 F. 2d 338, and this Court, granting certiorari, 340 U. S. 944, 71 S. Ct. 528, 95 L. Ed. 681, remanded the cause to the Court of Appeals for reconsideration in the light of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 71 S. Ct. 239, 95 L. Ed. 219. Acting upon this direction, the Court of Appeals reversed itself, and the District Court as well, and sent the case back for a new trial, 190 F. 2d 540.

Defendant Mead's Fine Bread Company, the respondent here, then sought certiorari, which was denied, 342 U. S. 902, 72 S. Ct. 290, 96 L. Ed. 675.

The cause was retried in the District Court in accordance with the second opinion of the Tenth Circuit. Petitioner, L. L. Moore, prevailed. The District Court's judgment (R. 32) in favor of petitioner was entered upon jury verdict and necessarily determined that Mead's Fine Bread Company had discriminated in price upon a geographical basis and that petitioner, L. L. Moore, had been injured by such discrimination in violation of federal statute.

Petitioner had engaged in the bakery business for eighteen years before commencement of this action. (R. 39) In 1940 he moved to Santa Rosa, New Mexico, and opened a bakery there. (R. 39) Early in 1943 petitioner entered the armed forces and in late 1945 he returned to reopen his bakery business at Santa Rosa. (R. 40) He then purchased additional equipment and modernized his plant in order to produce the new high-speed loaf of bread prevalent in his industry. (R. 43) By 1947 the value of petitioner's plant and going concern was \$23,459.34. (R. 44) The actual physical value of the equipment was \$20,000.00. (R. 160) This was not controverted.

In January, 1948, respondent, Mead's Fine Bread Company, entered the market and commenced trucking bread into Santa Rosa. (R. 48, 74) Mead's Fine Bread Company is a corporation which maintains its plant at Clovis, New Mexico. (R. 131) Its business lies athwart the Texas-New Mexico line. (R. 125, 133, 134) Through interlocking ownership and directorates, held by the Mead family and associates, it is a part of an interstate bakery business consisting of five corporations most of whose stockholders live in Texas, only one living in New Mexico, and which maintain plants in Lubbock and Big Spring, Texas, and in

Hobbs, Rosewell, and Clovis, New Mexico. (R. 124-135) All of these plants market their bread under the same trade-name, "Mead's Fine Bread", which is extensively advertised at great cost through a common program in West Texas and Eastern New Mexico by radio, motion pictures, billboard, and newspaper. (R. 135-137, 146-150, 249-251; Pl. Ex. 2, 3, 4, 6 to the deposition of Rex Webster; R. 149, 253; (R. 149, 255; R. 150, 257; R. 152, 259) This multistate aggregation of plants purchases flour and bread wrappers as a unit. (R. 135, 136; Pl. Ex. 3; R. 169, 279; Pl. Ex. 4; R. 169, 283) There are also Mead bakeries at Amarillo, Wichita Falls, San Angelo, El Paso and Abilene, Texas; Lawton, Oklahoma; and Albuquerque, New Mexico, all owned by close relatives of the majority stockholders of the five corporations mentioned above, and all using the same trade name and bread wrappers. (R. 133-136)

In 1948 petitioner decided that he would be better off if he moved to Tucumcari, New Mexico. (R. 76) However, after a group of business men had asked him if he would stay if all the merchants agreed to patronize him, he decided that he would stay if the merchants of Santa Rosa would support him one hundred per cent. (R. 77) These business men then circulated a petition to this effect. (R. 77, 86, 88) Petitioner had nothing to do with the petition or the decision of the business men of Santa Rosa to support him, and there is nothing in the evidence to indicate otherwise. He did accept the benefit of the support offered for the brief time it was available. After petitioner had been notified that the people of Santa Rosa would support him, he decided that it would be better for him to stay in Santa Rosa rather than going to the expense of moving into any new territory. (R. 84)

On September 3, 1948, contemporaneous with the unsolicited offer of merchants in Santa Rosa to patronize peti-

tioner one hundred per cent, respondent Mead cut the wholesale price of white sliced bread in Santa Rosa, New Mexico, from 14 cents to 7 cents for a pound loaf and from 21 cents to 11 cents for a loaf weighing one and one-half pounds. (R. 9, 48, 143, 144, 166) This price cut was ordered by Mead from Lubbock, Texas. (R. 142, 143, 165, 166) The price of bread at Santa Rosa prior to Mead's price cutting was the same as prevailed in all of Eastern New Mexico and West Texas. (R. 47, 126, 165) Mead did not cut the price of bread in any other area. (R. 166) It is admitted that these low prices were far below the cost of production and sale. (R. 166) On the windows of Santa Rosa stores Mead painted signs telling of the price cut which was reflected in reduced retail prices. (R. 167) Mead continued these low prices in effect at Santa Rosa until April 26, 1949, about six weeks after petitioner filed this suit. (R. 48, 145, 166)

It was stipulated that out of its Clovis, New Mexico plant respondent Mead operated a bread truck route to serve customers in Farwell, Texas, from September 18, 1946, to January 16, 1948, and from December 27, 1948, until the winter of 1951. (R. 131, 132) These were regularly scheduled deliveries. (R. 131, 132) Interstate shipments and sales by respondent under these regularly scheduled deliveries during the price war were made at the higher prices which respondent maintained in effect in all areas outside of Santa Rosa. (R. 47, 126, 131, 132, 166) The Mead organization also ships bread from Texas into New Mexico on a stand-by basis in the event of plant breakdowns in New Mexico. (R. 142)

Petitioner, L. L. Moore, found it impossible to meet the prices imposed by Mead. The losses sustained during this period finally forced him to close his business on February 28, 1950. (R. 49, 56, 57, 118, 119)

Petitioner's damages were extensive. The damages sustained involved loss of business, i. e., the physical plant and loss of profits. (R. 8) Petitioner testified that the value of his physical plant was \$15,559.34. (R. 43) The physical value of his plant and going concern value was \$23,459.34. (R. 44) That petitioner's testimony was conservative and justified is borne out by the valuation of \$20,000.00 placed on the physical equipment by Mr. Lehn Englehart, a witness with extensive experience in the bakery business in New Mexico. (R. 160) Both Mr. Englehart and petitioner agreed that the value of the physical equipment rose, rather than depreciated, from 1947 to the middle of 1951. (R. 44, 161) Mr. Englehart was disinterested and exceptionally well qualified to value petitioner's plant, having been in the bakery business since 1917. He had seen petitioner's plant and had bought and sold similar equipment. (R. 154, 155, 159) Respondent did not offer any testimony at all to controvert the valuation of the physical plant at \$20,000.00. Petitioner, with eighteen years experience in the bakery business, stated that in the town of Santa Rosa the customary profit of a bread bakery business like his would be ten per cent of the gross sales. (R. 71, 73) Mr. Englehart from his broad experience stated that in 1948 and 1949 a bakery of the kind or character of petitioner's and in a similar territory would have a profit of ten to twelve per cent of its gross sales. (R. 156, 157) Plaintiff's Exhibit 1 shows clearly that petitioner's bread sales were rising until respondent cut the price, and when the price was restored to normal, his sales again rose. (Pl. Ex. 1; R. 51, 53, 277) When the price cut of respondent went into effect, he had attempted to offset it by establishing truck routes which were expensive, and although he succeeded in increasing his gross, his net income continued to fall because of increased cost of sales to such route customers as he was able to ob-

tain elsewhere and because of his losses in Santa Rosa where he previously made his best profit. (R. 56, 118, 119)

The cause was submitted to the jury which returned a verdict of \$19,000.00 damages against Mead's Fine Bread Company in favor of L. L. Moore, the petitioner here. (R. 14). District Judge Carl A. Hatch trebled the damages determined by the jury and granted judgment to petitioner in the sum of \$57,000.00. Attorney's fees were fixed at \$11,400.00. (R. 32)

Summary of Argument

This is a case of importance in the application of Section 2 of the Clayton Act, 49 Stat. 1526, 15 U. S. C. A. § 13, to the protection of small intrastate competitors from ruinous geographic price-cutting by concerns engaged in interstate commerce.

The decision of the Court of Appeals conflicts squarely with a decision of this Court, *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320, and with a pre-Robinson-Patman Act case, *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, c. d., 279 U. S. 858, 49 S. Ct. 353, 73 L. Ed. 999, decided by the Second Circuit under the original Clayton Act.

This is a classic case of territorial price discrimination. Despite the clear language of the statute and the precedents of the two cases cited above, the Court of Appeals for the Tenth Circuit refused to apply the Robinson-Patman Act to the case at bar even though the high price leg of the discrimination was admittedly in interstate commerce. The Court of Appeals also asserted that the Robinson-Patman Act could not be constitutionally applied to the case at bar. The Court of Appeals erroneously engrafted into the statute the pseudo-requirement that there can be no violation of the Robinson-Patman Act "if the competitive injury . . .

was to a purely local competitor whose business was in no way related to interstate commerce". (R. 329)

Here one "leg" of the discrimination was in interstate commerce, *i. e.*, Mead's sold bread in Farwell, Texas, from its Clovis, New Mexico plant at double its price for the same kind of bread in Santa Rosa, New Mexico, where it was in competition with petitioner, in direct violation of the Act. Under the Act it is immaterial whether the low-price leg was in intrastate or interstate commerce. The prime purpose of the Act is, as its very language discloses, to forbid a concern engaged in interstate commerce to cut prices in any locality while holding them up elsewhere—an old and infamous device of monopoly. The erroneous decision of the Court of Appeals also imposes the anomalous requirement that the injured competitor himself must be in interstate commerce, apparently on the theory that only the elimination of an interstate competitor could "possibly" or "probably" have an effect on interstate commerce.

In the case at bar we *do* have the actual statutory effect pleaded and proved—the injury and elimination of petitioner as a competitor. The court below apparently lost sight of the fact that the Act applies where the effect "*may be* substantially to lessen competition or tend to create a monopoly in any line of commerce, *or prevent competition with any person who . . . grants . . . such discrimination . . .*" (Emphasis supplied) 49 Stat. 1526, 15 U.S.C.A. § 13(a). It also ignored the effect of the price action on the *discriminator*—Mead's Fine Bread Company—an interstate competitor which measurably extended its domain by its illegal acts at Santa Rosa, New Mexico.

In holding that the Commerce Clause of the Constitution itself would not permit the application of the Robinson-Patman Act to a case like the one at bar, the Court of Appeals has in effect declared the Act unconstitutional

insofar as it seeks to protect intrastate competitors from price discrimination by concerns engaged in interstate commerce. No principle of anti-trust law is more firmly established than that power of the Congress over interstate commerce is plenary, even extending to intrastate transactions by interstate operators where there is a possibility of an effect on the latter. That power has been exercised to the fullest extent in the Robinson-Patman Act.

The discriminations here complained of were in reality part and parcel of interstate commerce, even though respondent's plant was located in the same state in which the price discrimination took place, due to the fact that respondent is part of an interstate combination of five corporations operated as a unit behind a facade of separate corporate entities.

In the course of the long and peculiar history of this case the appellate courts have heretofore necessarily considered whether the petitioner had pleaded and proved a prima facie case at the first trial, and in this second appeal, upon the same issues of law and fact and substantially the same evidence, the "law of the case" doctrine should impel an appellate court to reach the same decision on the same issues involved in this appeal.

Argument

I. A PRICE CUT TO BELOW COST OF PRODUCTION IN ONE SEGMENT OF MEAD'S MARKET UNDER THE EVIDENCE ESTABLISHED A PRICE DIFFERENTIAL IN INTERSTATE COMMERCE IN VIOLATION OF THE SPECIFIC WORDS OF THE ROBINSON-PATMAN ACT AS CONSTITUTIONALLY APPLIED.

A. Petitioner Is Specifically Protected Against Injury From Mead's Blanket Price Cut In Santa Rosa. For Such Geographical Price Discrimination Is Prohibited By The Robinson-Patman Act And Is Within The Intent And The Power Of Congress.

The injury and destruction of small businesses through price cutting in local areas by large interstate firms first caught the attention of Congress in the now-famous Standard of New Jersey case, decided in 1911. In *Standard Oil Company of New Jersey v. United States*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, one of the charges under the Sherman Act was that the defendants "sold their products at times and places where there was competition below remunerative prices, and recouped their losses by selling such products at high prices at other times and places." *United States v. Standard Oil Co.*, 173 F. 177, 190 (C.C.E.D. Mo., 1909). That case under the Sherman Act foreshadowed the passage of the Clayton Act in 1914 and spotlighted the urgent need for legislation to protect the small seller. In 1913 the Honorable Louis D. Brandeis effectively pointed to the need for additional legislation:

"Americans should be under no illusions as to the value or effect of price-cutting. It has been a most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Farseeing organized capital secures by this means the cooperation of the shortsighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain, and selling his birthright for a mess of pottage, becomes himself an instrument of monopoly." *Harper's Weekly*, Vol. LVIII, No. 2969, Nov. 15, 1913, p. 10-12, *Cutthroat Prices—The Competition That Kills*, Hon. Louis D. Brandeis.

On May 6, 1914, Mr. Clayton, Chairman of the Committee on the Judiciary, House of Representatives, submitted his committee's report upon a new bill, H. R. Rep. No. 627, 63rd Cong., 2d Sess. (1914). This was the first version of what was to become the Clayton Act. The committee report states in part at page 7:

"Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors *by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country* . . . In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to *lower prices* of their commodities, oftentimes below the cost of production *in certain communities* and *sectic is where they had competition.*" (Emphasis added.)

Congress thus outlawed the act of discrimination in order to reach blanket price cutting in local areas by national concerns. As the Second Circuit stated in *Mennen Co. v. F. T. C.*,¹ 288 F. 774, 778-779 (CCA 2d, 1923):

"It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering *the prices* asked for their products *in a particular locality* in which their competitors were operating . . . Such lowering of prices was maintained within the particular locality while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the smaller rival was driven out of business, whereupon the prices in that locality would

¹ Despite its recognition of the legislative history in the *Mennen* case, the Second Circuit failed to give full effect to the statute. The case was later overruled in *Fan Camp & Sons v. American Can Co.*, 278 U. S. 245, 49 S. Ct. 112, 73 L. Ed. 311, 60 A. L. R. 1060 (1929).

be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil." (Emphasis added.)

Manifestly, territorial price discrimination was the principal target of the Congress of 1914. Congress sought to afford protection to small local sellers competing with large national sellers. Section 2 of the Clayton Act, 38 Stat. 730, was placed in our federal statute books with the principal purpose of preventing the use of the potent weapon of geographical price cutting. In the Clayton Act federal power reaches this illegal practice by declaring territorial price discrimination to be unlawful. By definition, territorial price discrimination involves sales to non-competing purchasers. Rarely, if ever, would such purchasers compete with each other, since they are located in cities or areas far apart but which are served by the same seller.

For twenty-two years the Clayton Act remained unchanged. Then in 1936 the Robinson-Patman Act brought changes in the law for the especial protection of *individual sellers*. The Robinson-Patman Act broadened the Clayton Act to make doubly sure that small individual sellers were protected against blanket local price cutting. 49 Stat. 1526, 15 U.S.C.A. § 13. The Clayton Act was ambiguous as to whether lessening of competition in general had to be shown before an individual seller could find protection under the statute. The important Robinson-Patman amendment made certain that injury to an individual competitor is encompassed by the statute. The Senate Committee Report on the Act said that the original Clayton Act had been

"... too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas *the more immediately important concern is in injury to the competitor victimized*

by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 4. (Emphasis added.)

In similar language the House Committee Report emphasized this strengthening of the statute. H. R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 8. Both the legislative history and the language of the statute make unmistakably clear that a discriminator's individual competitors are protected against illegal price differentials. Thus in *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 48, 68 S. Ct. 822, 829, 92 L. Ed. 1196, 1205 (1948), this Court stated the question to be "whether the differential works an injury to a *competitor*." (Emphasis added.) This Court further specifically stated (334 U. S. 37, 49, 68 S. Ct. 822, 830, 92 L. Ed. 1196, 1206):

"The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'" (Emphasis added.)

As this Court further stated in the *Morton Salt* case (334 U. S. 37, 49, 68 S. Ct. 822, 830, 92 L. Ed. 1196, 1206, the Robinson-Patman Act specifically changed the old Clayton Act because there had been a widespread "belief that § 2 of the Clayton Act had been too restrictive in requiring a showing of *general injury to competitive conditions* . . ."

Accordingly, the Court of Appeals correctly recognized in the case at bar that "the victim may maintain an action for damages *without* showing that the competitive injury was *general* in its scope and effect." (Emphasis added.) (R. 328.) Yet the same court erroneously proceeded to rule that the injuries sustained by L. L. Moore, petitioner here, were not actionable because the "purely local price cutting

war did not affect any line of commerce . . . (R. 330.) Nevertheless, respondent, Mead's Fine Bread Company, admittedly did engage in price differentials between Texas and New Mexico as shown by their stipulation (R. 131, 132).

Significantly, legislative history also makes it clear that by enactment of the Robinson Patman Act the Congress intended to tighten the fabric of the Clayton Act through restriction of defenses to charges of violation of the Act. As Senator Logan stated:

"The purpose of this bill is to stop up loopholes found in Section 2 of the Clayton Act." 80 Cong. Rec. (1936) 3119.

Hence, the Clayton Act, as strengthened by the Robinson-Patman Act, is geared to prevent territorial price discrimination through price cutting in local areas, to protect individual sellers from such blanket price cutting, and to eliminate the abuses which had grown up under defenses asserted to Clayton Act violations.

But the Court of Appeals lost sight of the basic purpose of the Robinson-Patman Act by trying to compare the fact situation in the case at bar with Sherman Act cases. The difference in the statutes has been recognized by this Court in numerous cases—first by application of the original Clayton Act to cases where the specific violations of that statute could not meet the requirements of the *broad effect* needed and *difficulties of proof* under the Sherman Act—and second by application of the Robinson-Patman Act to cases which were not clearly within the prohibitions of either the original Clayton Act or the Sherman Act. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 355, 356, 42 S. Ct. 360, 361, 66 L. Ed. 653; *Coca-Cola Products Refining Co. v. F. T. C.*, 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320; *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 43, 44, 68 S. Ct. 822, 826, 827, 92 L. Ed. 1196; A. L. R. 2d 260; *Porto*

Rican American Tobacco Co. v. American Tobacco Co., 30 F. 2d 234; c. d. 279 U. S. 858, 49 S. Ct. 353, 73 L. Ed. 999; Compare: *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 235, 236, 68 S. Ct. 996, 1005, 1006, 92 L. Ed. 1328; *U. S. v. Columbia Steel Co.*, 334 U. S. 495, 519, 68 S. Ct. 1107, 1120, 92 L. Ed. 1533; *Lotain Journal Co. v. U. S.*, 342 U. S. 143, 150 (n. 6), 152, 72 S. Ct. 181, 185, 186, 96 L. Ed. 162; *Times-Picayune Pub. Co. v. U. S.*, 345 U. S. 594, 609, 610, 73 S. Ct. 872, 881, 97 L. Ed. 819; *U. S. v. Employing Plasterers' Association of Chicago*, 347 U. S. 186, 74 S. Ct. 452, 98 L. Ed. 365. Although the recent Sherman Act cases as last compared show a recognition of the proper application of that statute to a relatively small geographical area, even more does the history and language of the Clayton Act as amended by the Robinson-Patman Act dictate the conclusion that it was specifically designed to fill that void in geographical price discrimination existing under the Sherman Act which made effective protection of the small seller so difficult.

The court below by overlooking the territorial application had great difficulty with the constitutional aspects of the Robinson-Patman Act, saying that:

"... the wrongs complained of must involve interstate commerce, either in 'effect' or 'purpose', for obviously, the acts can have no greater potency than the commerce clause itself." (R. 328)

The Tenth Circuit Court of Appeals then erroneously concluded that local conduct, such as that court assumed this case to involve, *which is separable and unrelated to interstate commerce*, is necessarily "insulated" from the operation of the anti-trust laws and cites as support *U. S. v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 297, 65 S. Ct. 661, 663, 89 L. Ed. 951. The *Frankfort Distilleries* case reversed the holding of this same court below, the Tenth Circuit

Court of Appeals, in which two of the Judges in the case at bar participated. It involved a criminal prosecution for violation of the Sherman Act alleging that the defendants combined and conspired to restrain interstate trade in raising, fixing, and maintaining high retail prices for alcoholic beverages shipped into Colorado. The Tenth Circuit Court of Appeals there erroneously held that, since a retailer could not purchase from anyone but a wholesaler under Colorado law, the title vested in the wholesaler at the time it crossed the state line where it ceased to be an integral part of interstate commerce so that the sales to the retailers were wholly intrastate transactions and not violative of the Sherman Act. *Frankfort Distilleries v. U. S.*, 144 F. 2d 824, 834. This Court reversed the Tenth Circuit by stating in reference to the Sherman Act in *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297, 65 S. Ct. 661, 663, 89 L. Ed. 951 as follows :

" . . . there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states. It is true that this Court *has on occasion* determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents fall within this category. *All of them* involved the application of the Anti-Trust laws to combinations of businessmen or workers in *labor disputes, and not to interstate commercial transactions*. On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sher-

man Act, left no area of its constitutional power unoccupied; it "exercised 'all the power it possessed.'"
 . . . The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance. (Emphasis added)

The *Frankfort Distilleries* case, *supra*, simply did not stand at that time for the proposition applied in the Court below except in a labor dispute type of situation, which should have been apparent had that Court not lifted a sentence out of context and disregarded the qualifying sentence that immediately followed. Whether labor situations are now an exception is questionable in view of recent decisions. *U. S. v. Employing Plasterers' Association of Chicago*, 347 U. S. 186, 74 S. Ct. 452, 98 L. Ed. 365 (Adv.); *Las Vegas Merchant Plumbers Ass'n. v. U. S.*, 210 F. 2d 732 (9th Cir. 1954). It is clear, however, that the language in *Frankfort Distilleries, supra*, at best has reference only to (1) Sherman Act cases and (2) labor disputes and not commercial transactions, and it has no reference whatsoever to the specific prohibitions of the Robinson-Patman Act. It is apparent that the Tenth Circuit Court of Appeals is straining to adhere to an erroneous conception of the Sherman Act which was reversed by this Court, and which the Court below, despite reversal, refuses to abandon and continues to try to engraft on this Robinson-Patman Act case.

The Court of Appeals finally places great reliance on a quotation from *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120, 62 S. Ct. 523, 526, 86 L. Ed. 726, where this Court states that "It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power." But the Court below left out the preceding words

which specifically approve even Sherman Act power over intrastate activity when this Court said:

"Competitive practices which are wholly intrastate may be reached by the Sherman Act, 15 U. S. C. A. § 17, 15 note, because of their injurious effect on interstate commerce. . . . So too the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional regulation of the intrastate activity." (Emphasis added)

In fact, the *Wright Wood Dairy* case, *supra*, held that the Agricultural Marketing Agreement Act of June 3, 1937, 50 Stat. 246, 7 U.S.C.A. § 608c, was constitutional under the commerce clause although the dairy company subjected to the Act was *wholly an intrastate commerce*. The clear language of this case requires no interpretation. And its principle applies here where the price discrimination in Santa Rosa, New Mexico, by below-cost sales while the interstate sales in Farwell, Texas, remained high brought respondent's conduct within both § 13(a) and § 13a of 15 U.S.C.A.

The Court below seems to focus only on the intrastate character of petitioner while ignoring the interstate character of respondent. In its second and third opinions the Tenth Circuit Court of Appeals found that respondent was in interstate commerce. *Moore v. Mead Service Co., et al.*, 190 F.2d 540, 541; *Mead's Fine Bread Co. v. Moore*, 208 F.2d 777, 780. (R. 329) In addition, there was ample evidence of an interstate combination of Mead owned and controlled bakeries standing athwart the Texas-New Mexico line. (R. 124, 125, 129, 131-135) This combination used a common name, a common management, a common advertising program, and a common purchasing arrangement and had interlocking directorates. (R. 135, 136, 137, 169) As a result, all of respondent's sales were of an interstate

character because respondent, itself, was acting in interstate commerce and in concert with other Mead bakeries who sold in states other than New Mexico where the price was the same as at Farwell, Texas. (R. 47, 126) Respondent's interstate character necessarily results in the "means" used here extending beyond the boundaries of one state. Even more important, respondent's particular discriminatory sales extend beyond the boundaries of one state, as respondent stipulated. (R. 131, 132)

The anachronistic decision of the Court of Appeals can probably best be explained by that Court's failure to grasp that the effect on or purpose concerning interstate commerce, which it so avidly sought but could not find, actually lay not at Santa Rosa, New Mexico, but rather on or in the territorial area of respondent's interstate character. *Manderville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 232, 68 S. Ct. 996, 1004, 92 L.Ed. 1328. The Congress by passage of the Section 2 of the Clayton Act and the Robinson-Patman amendment determined that a price discrimination by one engaged in interstate commerce necessarily affected interstate commerce, as it must, while injuring the one in intrastate commerce. It is the cause of action given the one injured that deters or punishes the interstate wrongdoer. The Robinson-Patman Act strikes down such unlawful practices in their "incipiency". *Corn Products Refining Co. v. F. T. C.*, 324 U.S. 726, 738, 65 S. Ct. 961, 967, 89 L.Ed. 1326, 1332 (1945).

The forbidden effect here lies in preventing these little independent units from being "gobbled up by bigger ones". *U. S. v. Columbia Steel Co.*, 334 U. S. 495, 534, 68 S. Ct. 1107, 1127, 92 L. Ed. 1533. It is thus that monopoly is prevented prior to conception rather than attacked after birth. That the commerce clause gives to Congress this power has never been questioned until raised by the Court below on its third consideration of this matter. That it is with-

out substance is apparent. That it demands reversal by this Court is certain.

B. Local Price Cutting Is Prohibited Where Either The High Price Or The Low Price Leg Of The Discrimination Is In Commerce.

There are only two essential facts to bear in mind here. The first is that respondent, Mead's Fine Bread Company, was in interstate commerce as twice determined by the Court of Appeals. *Moore v. Mead Service Co., et al.*, 190 F. 2d 540, 541; *Mead's Fine Bread Co. v. Moore*, 208 F. 2d 777, 780. (R. 329) The second fact is that Mead trucked bread produced at Clovis, New Mexico, to Farwell, Texas, on a regular route during the course of the price discrimination and sold that bread at wholesale for fourteen cents per pound in interstate commerce while selling the same product at Santa Rosa, New Mexico, for seven cents per pound. (R. 9, 131, 132, 144, 165, 166)

The governing words of the statute declare as unlawful a discrimination in price

“ . . . between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States. . .*” (Emphasis added). 49 Stat. 1526; 15 U. S. C. A. § 13(a)

Accordingly, the coverage of the Act extends “to discrimination between interstate and intrastate customers, as well as those purely interstate When granted to those within the State [as at bar] and denied those beyond, they [price differentials] involve . . . a directly resulting burden upon interstate commerce with the latter” See, Rep. No. 1502, 74th Cong. 2d Sess. (1936) 4, 5. The Tenth Circuit Court of Appeals completely disregarded the foregoing controlling words of the statute. Moreover, that court

utterly ignored the highly pertinent committee report set out above. If the Tenth Circuit had paid heed to these governing factors, it would not have fallen into the great error of its decision. Yet the Tenth Circuit's opinion does not once consider these basic, statutory words enacted by Congress.

Indeed, it is implicit in the words "price discrimination" that there be two "legs" of prices, one high and one low, *either* or both of which may be in interstate commerce. This is borne out by Webster which defines "to discriminate" as being "to make a difference in treatment or favor (of one as compared with others)" And "discrimination" is "a distinction in treatment Specif. . . . a difference in treatment made between persons, localities, or classes of traffic in respect of substantially the same service." Webster's New International Dictionary, 2d Ed., unabridged (1941), G. & C. Merriam Co.

Thus, a price differential—unequal price treatment—is within the affirmative prohibitions of Section 2(a) of the amended Clayton Act and is illegal unless it can be justified by cost differences or otherwise. It should be noted that in this case there was no attempt either in the pleadings or in the evidence to bring respondent's discrimination within any of the specific justification provisos enumerated in the statute. In *Samuel H. Moss, Inc. v. F. T. C.* 148 F. 2d 378, 379 (2d Cir., 1945), reh. 155 F. 2d 1016 (2d Cir., 1946), c. d., 326 U. S. 734, 66 S. Ct. 44, 90 L. Ed. 437, a case similar to the case at bar in that it involved injury to sellers competing with the discriminator, the Second Circuit held that discrimination was shown by proof that "respondent sold rubber stamps to some of its customers at lower prices than it was selling the same stamps to other customers." Similarly, in *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 44, 68 S. Ct. 822, 827, 92 L. Ed. 1196, this Court held that the "avowed pur-

pose" of the Act was "to protect competition from all price differentials except those based in full on cost savings . . ." In other words, as this Court has put it:

"A price discrimination is measured by the difference between the high price to one purchaser and the lower price to another." *F. T. C. v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 757, 65 S. Ct. 971, 976, 89 L. Ed. 1338, 1346.

By command of the statute, this is true whether the price difference is accorded to competing purchasers who are usually located in the same geographical area or to non-competing purchasers located in different geographical areas, as in the case at bar. *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 236 (2d Cir., 1929), c. d. 279 U. S. 858, 49 S. Ct. 353, 73 L. Ed. 999. Indeed, the original purpose of the Clayton Act in 1914 was, and still is, to protect *sellers* competing with discriminator in a particular, local, geographical area. In both cases the statute protects the injured seller who has borne the brunt of the discriminating seller's price differential. Thus, with Mead's price cut in Santa Rosa came unlawful price discrimination in interstate commerce. This discrimination was direct, and it was, in the controlling terms of the statute, . . . *where either or any of the purchases involved in such discrimination are in commerce . . .*" (Emphasis added) 49 Stat. 1526, 15 U.S.C.A. § 13(a).

In *Corn Products Refining Co. v. F. T. C.* 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320, as in the case at bar, territorial price differentials were involved. There petitioner was in interstate commerce having plants in both Chicago and Kansas City for the manufacture of glucose, but, even though deliveries were made from the Kansas City factory, the freight from Chicago was added. This discrimination most benefited the purchases made by the Curtiss Candy

Company which was located in Chicago. Although Curtiss itself was in interstate commerce and in competition with all manufacturers of one and five cent candy bars, in answer to the allegation that, if the sales to Curtiss were *not* in interstate commerce, application of the Robinson-Patman Act to them, would be unconstitutional, and that in any case such sales did not affect commerce, this Court said:

"Moreover, some of petitioner's sales to other companies, to whom these allowances were not accorded the [high-price leg], were made in interstate commerce; thus there was a discrimination against sales in interstate commerce, well within the power of the Commission to remedy." *Ibid.*, 324 U. S. 744, 745, 65 S. Ct. 961, 970, 89 L. Ed. 1320.

This statement is in absolute accord with the intent of Congress, for Representative Utterback, manager of the bill in the House, followed the lead of the Senate committee, and foreshadowed the *exact* case at bar, in explaining that local price cutting by a company in selling outside the state as well as locally was within the Act's prohibitions when he said:

"Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, *nor may he favor his local trade to the injury of his interstate trade.*" (Emphasis added) 80 Cong. Rec. (1936) 9559.

In the *Corn Products* case, *supra*, the sales at Chicago to the Curtiss Candy Company, also in Chicago, were *intra-state and purely local* and represented the low-price leg of the discrimination because other sales had the freight from

Chicago added regardless of the place of production, so that sales from Kansas City would be in the high-price leg. Thus, the local sales in Chicago necessarily were favored, just as Mead favored local sales at Santa Rosa in the case at bar. In the instant case the low-price leg of the discrimination was intrastate at Santa Rosa, New Mexico, while the high-price leg was in interstate commerce going from New Mexico into Texas. Since it cannot be questioned that the sales in Texas were in interstate commerce, the discriminatory acts of the respondent corporation are clearly within the words "... where either or any of the purchases involved in such discrimination are in commerce. . . ." 49 Stat. 1526, 15 U.S.C.A. §13(a).

The decision of the Court of Appeals even conflicts with the decision of the Second Circuit in *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir., 1929), *cd.* 279 U.S. 858, 49 S. Ct. 353, 73 L.Ed. 999, which occurred prior to the insertion of the amendatory words, above quoted, of the Robinson-Patman Act. The Porto Rican company brought a suit asking for an injunction against a price discrimination practice of the American Tobacco Co. in the sale of Lucky Strike cigarettes within the island of Porto Rico. The Porto Rican company manufactured and sold its cigarettes wholly within Porto Rico to wholesalers and jobbers who in turn retailed them for not more than twelve cents per package. Lucky Strikes were manufactured in the United States and imported into Porto Rico and sold for fifteen cents. The Porto Rican Legislature increased the tax on cigarettes, so that Lucky Strikes necessarily would retail at eighteen cents whereas the Porto Rican brands remained unchanged. About two weeks after the tax increase went into effect, American cut the price of Lucky Strikes to twelve cents a package, which would cause it a loss of some \$140,000 per year. As a result Porto Rican had to lower its price to ten cents, bare factory cost,

causing it a loss of \$150,000 to \$180,000 per year. Injunctive relief was granted, the Court saying:

"The appellant could stand this competition in this price warfare. Its sole business in Porto Rico was the sale of 'Lucky Strikes', and this was about one half of 1 per cent of its entire 'Lucky Strikes' business throughout the world. A loss there would not impair its financial stability, but the appellee could not so compete. Such price cutting to capture the market, by eliminating the appellee therefrom, is prohibited by the provisions of the Clayton Act. It was foreign to any legitimate commercial competition." *Ibid.*, 237.

Porto Rican's sales were strictly local and, just as in the case of Mead's, represented the low-price leg. The high-price leg was in the United States. It is plain that interstate commerce in the United States was burdened with the high price leg. The Second Circuit squarely held that differentials in price between *non-competing* purchasers, "those of the United States and of Porto Rico," violated Section 2 of the Clayton Act because the plaintiff, as a seller competing with the discriminator, was injured. *Ibid.*, 30 F. 2d 234, 236. The injury resulted from the price cut established by the defendant in Porto Rico while normal prices were maintained in the United States. Both in our case and in the *Porto Rican* case the low-price leg of the discriminator's sales occurred in competition with the local sales of the injured competitor.

It is apparent that the Court of Appeals has failed to recognize that Congress by use of the word "discrimination" in Section 2(a) of the amended Clayton Act meant a bundle or unit consisting of two price legs, one high and one low. It is the relationship between the low-price and high-price legs that constitutes the discrimination. One cannot isolate either price leg and give effect to the intent of the statute. Proof that a seller has charged one pur-

chaser a higher price than another—at least two sales at a different price—is a “discrimination” under the statute. *F. T. C. v. Morton Salt Co.*, 334 U.S. 37, 45, 68 S. Ct. 822, 827, 828, 92 L.Ed. 1196; *Bruce’s Juices v. American Can Co.*, 330 U.S. 743, 755, 67 S. Ct. 1015, 1021, 91 L.Ed. 1219; *F. T. C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 757, 65 S. Ct. 971, 976, 89 L.Ed. 1338; *Corn Products Refining Co. v. F. T. C.*, 324 U.S. 726, 738, 739, 65 S. Ct. 961, 967, 89 L. Ed. 1320; *Porto Rican American Tobacco Co.*, 30 F.2d 234, 237, c.d., 279 U.S. 858, 49 S. Ct. 353, 73 L.Ed. 999. There being a price discrimination—sales of bread at seven cents a pound in New Mexico compared to fourteen cents a pound interstate into Texas—and one leg being in interstate commerce—the commerce requirements of the statute are fully met—“where either or any of the purchases. . . are in commerce . . .” 49 Stat. 1526, 15 U.S.C.A. §13(a); 37 Geo. L. J. 217.

Respondent’s conduct is a blatant violation of the unambiguous words of the Robinson-Patman Act. The decision of the Court of Appeals should be reversed.

C. Injury To A Wholly Intrastate Competitor By An Interstate Corporation’s Discriminatory Price Cutting Constitutes a Direct Violation Of The Robinson-Patman Act.

The previous discussion of the legislative history of the Robinson-Patman Act reflects the steps which Congress took to strengthen the Clayton Act. As stated heretofore, one of the most significant of such steps was to afford protection to an individual seller upon showing of injury to himself alone. Rather than injury to competition in general, “the more immediately important concern is in injury to the competitor victimized by the discrimination.” (Emphasis added). Sen. Rep. 1502, 74th Cong., 2d Sess. (1936) 4; *F. T. C. v. Morton Salt Co.*, 334 U.S. 37, 49, (n. 18), 68 S. Ct. 822, 830, 92 L.Ed. 1196, 1206 (1948). Thus, in 1936, Congress supplemented the original Clayton Act’s prohibition of discrimination which “lessen competition” by the addi-

tion of the italicized words in the qualification clause which follows:

" . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who . . . grants . . . such discrimination.* . . . " (Emphasis added) 49 Stat. 1526; 15 U.S.C.A. § 13(a).

In the case at bar it is Mead's Fine Bread Company which "grants . . . such discrimination . . . " 49 Stat. 1526, 15 U.S.C.A. § 13(a). And the respondent corporation concededly was in competition with petitioner, L. L. Moore. Hence, petitioner was in the direct line of the injury from respondent's price cut.

Petitioner's bread business was wholly intrastate. A small amount of cakes which he had for resale were shipped from California (R. 68, 122). It is undisputed however, that Mead shipped bread from New Mexico to Texas on regular routes and sold it at its regular price in this interstate commerce during the period of the price discrimination (R. 131, 132, 165, 47). Further, Mead's Fine Bread Company was a part of an interstate combine of corporations which did business in both New Mexico and Texas (R. 124, 125, 129, 131-135). This combine jointly purchased materials and supplies outside of New Mexico which were shipped interstate to the particular bakery needing them (R. 136, 169). Moreover, the Court of Appeals has twice found that Mead was in fact engaged in selling in interstate commerce. *Moore v. Mead Service Co., et al.*, 190 F. 2d 540, 541; *Mead's Fine Bread Co. v. Moore*, 208 F. 2d 777, 780 (R. 329).

There can be no argument about the facts of the price discrimination. The respondent corporation admitted that it cut the price of bread at Santa Rosa, New Mexico, to

seven cents per pound loaf while its price elsewhere was fourteen cents (R. 9). Similarly, in Santa Rosa the price of a pound and a half loaf was cut by Mead from twenty-one to eleven cents (R. 165, 166). The price was not cut anywhere else (R. 165). This price cut was considerably below the cost of production and sales (R. 166). And it was maintained from September 3, 1948, until April 26, 1949 (R. 164, 166), although the original excuse for it vanished the first day, for all practical purposes (R. 91, 92). It is noted that this action was commenced on March 10, 1949 (R. 1, No. 362, October Term 1951). It cannot be controverted that petitioner, L. L. Moore, was driven to the wall, bankrupted and destroyed as a competitor as a result of respondent's drastic price discrimination (R. 56, 57, 58). Petitioner, having lost his bakery, now drives a gasoline truck (R. 39).

Upon these basic facts and under its strange conception of the law, the Court of Appeals stated:

"But there is positively no evidence that the discriminatory sales had even the probable effect of lessening competition or tended to create a monopoly . . . or to destroy or prevent competition with Mead at any place except Santa Rosa . . . If competition was lessened or a monopoly created, it was purely local in its scope and effect and in no way related to or affected interstate commerce." *Mead's Fine Bread Co. v. Moore*, 208 F. 2d 777, 780 (R. 329).

Yet, in the same paragraph, the Court below states that "The suppressive effect [s] . . . on competition at Santa Rosa, *reprehensible* as they may have been . . ." did not reach beyond New Mexico and so is not within Section 13(a). (Emphasis added) *Ibid.* In the light of the history of the Robinson-Patman Act, surely "reprehensible" price discrimination by a discriminator who is clearly within the

words of the Act necessarily must have one of the forbidden effects or else this statute is useless and fails entirely to meet the ends that Congress so clearly intended. More especially is the violation and injurious effect apparent where the competitor is *completely eliminated* as here.

The injury sustained by L. L. Moore, the petitioner, is the prohibited injury specifically contemplated by the statute. Contrary to the opinion of the Tenth Circuit, it is of *no* significance whatsoever under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, that petitioner is not engaged in interstate commerce *so long as respondent is*. Under the statute discriminatory injury to this local individual is illegal.

Price discriminations of the degree here practiced could have but one effect even if such were used in only one retail outlet—bread at half price is too tempting a morsel for either the poor or the rich to ignore. Bread at this price will be bought, and it will be bought to the exclusion of that made by the honest baker. It is as said in *F. T. C. v. Morton Salt Co.*, 334 U.S. 37, 50, 51, 68 S. Ct. 822, 830, 92 L. Ed. 1196, 1206 (1948):

“ . . . we believe [it] to be self-evident . . . that there is a ‘reasonable possibility’ that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of those customers.”

Such practice as here found is “foreign to any legitimate commercial competition.” *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir., 1929), *c. d.* 279 U. S. 858, 49 S. Ct. 353, 73 L. Ed. 999. Even more so is half price “unreasonably low” and the destruction or elimination of a competitor certain within the provisions of the companion section of the Robinson-Patman

Act enacted under the sponsorship of Senators Borah and Van Nuys (15 U. S. C. A. § 13a). If this case had finally been tried before petitioner's business demise, there would have been strong support for a finding of injury to petitioner. But, after his financial death, there is nothing more an autopsy could show. Actual destruction by price discrimination, as here, must be illegal, *per se*. Yet the statute, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, *only* requires that the price discrimination *may have had one of the prohibited effects*. Thus if this competitor was injured—and indeed he was—a forbidden effect exists under the plain language of the statute. *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 45, 46, 47, 68 S. Ct. 822, 827, 828, 92 L. Ed. 1196, 1204 (1948); *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726, 738, 742, 65 S. Ct. 961, 967, 969, 89 L. Ed. 1320, 1332, 1334 (1945).

The Court below sees in the Robinson-Patman Act a requirement that the injury must be to one whose business is in some way related to interstate commerce. *Meud's Fine Bread Co. v. Moore*, 208 F. 2d 777, 780 (R. 329). This is to say that one in interstate commerce may destroy a wholly intrastate competitor with impunity. Manifestly, the words of the statute permit no such implication, and it is contrary to the legislative history of the Act. If it were so, then the Second Circuit was in grave error in *Porto Rican American Tobacco Co. v. American Tobacco Co.* *supra*, because even under the *original* Clayton Act that court enjoined price-cutting affecting an entirely local competitor. See also *Greenleaf v. Brunswick-Balke-Collender Co.*, 79 F. Supp. 362 (D. C., E. D. Pa.); *Midland Oil Co. v. Sinclair Refining Co.*, 41 F. Supp. 436 (D. C., N. D. Ill.); *Reid v. Doubleday & Co., Inc.*, 109 F. Supp. 354 (N. D. Ohio, W. D.). Furthermore, it is significant that even under the Sherman Act the fact that a plaintiff is in interstate commerce is *immaterial*

if the defendant is. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241; *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255, 61 S. Ct. 210, 85 L. Ed. 173. It is obvious that, where a discriminator is in interstate commerce and violates the specific prohibitions of the Robinson-Patman Act, the persons injured, regardless of their commerce character, can recover (See Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. § 15).

Farther, respondent's interstate character necessarily reaches beyond the boundaries of New Mexico, so that whenever a competitor is injured or eliminated there is a concomitant benefit to respondent. The benefit to respondent in turn has an effect on interstate commerce which Congress by adopting the Robinson-Patman Act declared detrimental. How it is possible to segregate a particular "means" used by one in interstate commerce or to pick out one from the bundle of privileges inherent in the use of interstate commerce and say, "This one did it," this petitioner cannot say. If respondent is in interstate commerce and "The facts . . . read upon the literal language the statute," (R. 329) that should be sufficient because Congress' power over that commerce is plenary. *Shreveport Rate Cases*, 234 U. S. 342, 34 S. Ct. 833, 58 L. Ed. 1341; *Rd. Com. of Wisc. v. C. B. & Q. R. R.*, 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371. The words of the Honorable Harlan Fiske Stone while an Associate Justice of the United States Supreme Court are directly apposite here:

"The power of Congress to regulate interstate commerce is *plenary*, and extends to all such commerce be it great or small. *Hanley v. Kansas City S. R. Co.*, [187 U. S. 617, 47 L. Ed. 333, 23 S. Ct. 214] *supra*. The exercise of congressional power under the Sherman Act, . . . the Clayton Act, . . . the Federal Trade Commission Act, . . . or the National Motor

Vehicle Theft Act, . . . has never been thought to be constitutionally restricted because in any particular case the volume of commerce affected may be small." (Emphasis added) *N. L. R. B. v. Fainblatt*, 306 U. S. 601, 606, 59 S. Ct. 668, 671, 672, 83 L. Ed. 1014, (1939).

The suppressive effect on commerce by the interstate combine of corporations here involved is also apparent. If they can pick off and eliminate local competitors, as they did petitioner, monopoly and the destruction of competition will be the result. Intrastate sales only, together with the interstate combine's wrongful purpose, probably would be sufficient. See *F. T. C. v. Cement Institute*, 333 U. S. 683, 695, 696, 68 S. Ct. 793, 800, 92 L. Ed. 1010. However, if the Court of Appeals is correct in this case, then the method for avoidance of the Robinson-Patman Act is defined—simply incorporate in each state and not let the low-price leg of the sales cross a state line. Petitioner does not believe that Congress intended this statute to be a nullity. It means what it says. This petitioner has satisfied every element of the Act's requirements and is entitled to its protection. Nebulous speculation on the meaning of the plain words of the Robinson-Patman Act should not be permitted to cloud recovery in a case as clear as this. The decision of the Court of Appeals should be reversed.

D. No Proof Of Intent Is Required Under The Robinson-Patman Act.

While there was ample evidence at bar to justify a finding under the general verdict that Mead specifically intended to injure petitioner (R. 176-178, 181-183), such evidence is not necessary to sustain the judgment of the District Court under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

It is axiomatic that Section 2 of the Clayton Act, as

amended by the Robinson-Patman Act, does *not* require a plaintiff to show that a price-cutting defendant had any purpose or intent to injure a competitor. The act of discriminating in price is illegal, regardless of any state of mind. Neither Section 2 of the original Act, nor its amended form, requires purpose or intent to be shown in order to prove a violation.

In 1914 as finally passed after conference committee agreement, the words ". . . with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor, or either such purchaser or seller . . ." were stricken from the original House bill. Not only has the enactment never contained the elements of purpose or intent, but Congress made its legislation doubly clear by eliminating such language from the original House bill. See: Doc. No. 584, 63rd Cong., 2d Sess. (1914) 4. The Robinson-Patman amendment did not change the statute in this respect, and the act of discrimination remains illegal regardless of purpose or intent. 49 Stat. 1526, § 1; 15 U. S. C. A., § 13; *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 45, 68 S. Ct. 822, 827, 828, 92 L. Ed. 1196, 1203 (1948).

II. ON SECOND APPEAL, AFTER A NEW TRIAL ON IDENTICAL ISSUES OF LAW AND FACT AND SUBSTANTIALLY THE SAME EVIDENCE, WHERE THIS COURT HAS GRANTED CERTIORARI ONCE AND DENIED IT ONCE, ISSUES OF LAW AND FACT WHICH NECESSARILY WERE INVOLVED, CONSIDERED AND DETERMINED ON THE PRIOR APPEAL SHOULD NOT, UNDER THE DOCTRINE OF "LAW OF THE CASE," BE RECONSIDERED.

The most recent of the three opinions of the Court of Appeals in this case is all the more amazing because it resurrects issues long ago laid to rest. After two trials on identical issues of law and fact, and on substantially the same evidence, the Court of Appeals had a golden opportunity to

apply the doctrine of "law of the case." *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 6 S. Ct. 654, 29 L. Ed. 858; *City and County of Denver v. Denver Tramway Corp.* (10th Cir.), 23 F. 2d 287, *c. d.*, 278 U. S. 616, 49 S. Ct. 20, 73 L. Ed. 539; *State of Kansas v. Occidental Life Ins. Co.*, (10th Cir.), 95 F. 2d 935, *c. d.*, 305 U. S. 603, 59 S. Ct. 63, 83 L. Ed. 383. Although a decision of a court of appeals is not ordinarily law of the case in this Court, *Messinger v. Anderson*, 225 U. S. 436, 32 S. Ct. 739, 56 L. Ed. 1152; *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629, it is submitted that the peculiar history of this action tends to bring it within that rule.

In the first trial the complaint was dismissed at the conclusion of petitioner's case in chief, on grounds of justification under certain exceptions in the Robinson-Patman Act. The Court of Appeals, 184 F. 2d 338, affirmed on the ground that the petitioner was in *pari delicto*, and this Court, granting certiorari, 340 U. S. 944, 71 S. Ct. 528, 95 L. Ed. 681, remanded the case to the Court of Appeals for reconsideration in the light of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 71 S. Ct. 259, 96 L. Ed. 219, handed down at the same term. Acting upon this mandate, the Court of Appeals reversed itself and the District Court and sent the case back for a new trial, 190 F. 2d 540. The defendant then sought certiorari, which was denied, 342 U. S. 902, 72 S. Ct. 290, 96 L. Ed. 675.

This Court thus has had two prior opportunities to consider whether the petitioner pleaded and proved a *prima facie* case in the first trial. When certiorari was granted, the *per curiam* memorandum and mandate did not decide any specific issues, but by calling attention to the *Kiefer-Stewart Co.* case this Court certainly pointed the way for the Court of Appeals. In view of this, denial of certiorari after the Court of Appeals reversed itself and the District

Court must be given more significance than it otherwise would. It was tacit approval of the decision presented for review and of the way this Court's mandate had been obeyed.

Out of the plethora of cases in which this Court has told the bar that a denial of certiorari imports no expression of opinion on the merits of the case (e. g., *Sunal v. Large*, 332 U. S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982), counsel has found not one in which the judicial history paralleled the one at bar, or in which there are such compelling reasons for qualifying the oft-stated rule denying significance to a denial of certiorari. It stands to reason that, after granting certiorari once and remanding the case for reconsideration in the light of a specific case, this Court would have reviewed the second decision of the Court of Appeals had it been contrary to the mandate.

Clearly, if this Court had reversed the Court of Appeals after granting certiorari the first time and had sent the case back to the District Court for a new trial, and it had come up again on substantially the same evidence and issues of fact and law, the "law of the case" doctrine would have prevented reconsideration of such basic questions as whether the acts complained of had the requisite effect on commerce and upon a competitor to come within the Robinson-Patman Act. *Barney v. Winona & St. P. R. Co.*, *supra*, 117 U. S. 228, 6 S. Ct. 654, 29 L. Ed. 858. If the petitioner had not pleaded and proved a *prima facie* case before the first appeal, this Court could have denied certiorari, or, having granted it due to the necessity of correcting a serious error by the Court of Appeals on an important question of federal law, could have disposed of the case summarily on the other grounds.

The action of this Court in remanding the case for further consideration indicated clearly that it did not agree

with the erroneous first decision of the Court of Appeals that the petitioner must be denied relief because he was in *pari delicto*. In so doing this Court of necessity considered the questions presented by the record and briefs of the parties. Reference is made to Part IV and Part V of respondent's brief replying to petitioner's original petition for certiorari, the headings of which are, respectively, "The Dispute Involved Is of a Local Character and Had No Impact Upon Interstate Commerce," and "There Must Be a Showing That a Price Discrimination May Substantially Have the Effect of Lessening, Injuring, Destroying or Preventing Competition or Tend to Create a Monopoly." These points were pleaded and argued by respondent at every opportunity in both trials and appeals.

By the great weight of authority, questions which might have been, but were not, raised or presented on a prior appeal will not be considered on a subsequent appeal. *The Santa Maria*, 10 Wheat. 442, 5 L. Ed. 261; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658; *Tyler v. Magwire*, 17 Wall. 281, 21 L. Ed. 583; *The Lady Pike (Pearce v. Germania Ins. Co.)*, 96 U. S. 461, 24 L. Ed. 672; *United States Trust Co. v. New Mexico*, 183 U. S. 535, 22 S. Ct. 172, 46 L. Ed. 315. But here the questions now involved were presented and argued on the prior appeal and were necessarily involved, considered and determined by this Court in arriving at its decision to remand the case for further consideration, especially since the *Kiefer-Stewart Co.* case to which the the Court of Appeals was referred dealt only with one specific matter, that is, whether the doctrine of *pari delicto* had any application to an action for damages under the anti-trust laws.

At the second trial, under the "law of the case" stemming from the Tenth Circuit's opinion at 190 F. (2d) 540, the District Court would have been justified in directing the

jury to find for the petitioner on the commerce issues. Instead, it submitted them on meticulous instructions (R. 227-236, 242, 243) with which the Court of Appeals found no fault (R. 327, 328), and the jury found all issues for the petitioner. It would have been utterly meaningless and useless and a waste of time and money to send this case all the way back to the District Court for a new trial if the petitioner had not pleaded and proved a *prima facie* case in the first one. Petitioner challenges respondent to point out any substantial difference in the evidence adduced at the two trials, aside from the strengthening addition of the petitioner's evidence on the interstate character of respondent's combination with other bakeries, or to show wherein respondent rebutted petitioner's *prima facie* case.

III. THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REINSTATED SINCE THERE IS NO GROUND FOR REVERSING THAT JUDGMENT.

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951), and in *Stony Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931), two antitrust actions, the Court examined assignments of error not decided by the courts of appeals for the circuits and affirmed the judgments of the district courts.

At bar the respondent's reply to the petition for certiorari sets forth assignments of error which in their essentials are simply that the damages are excessive and that respondent should be excused from its illegal discrimination on some theory of justification. These are simple questions of law answered by the decisions of this Court cited immediately hereinabove and by the second decision of the Tenth Circuit Court of Appeals herein (190 F. 2d 540), among others.

This cause has been twice tried, the trial court having been found to be in error in the first instance. This cause has been the subject of three appellate opinions in the Tenth Circuit, two of which have been erroneous and one correct after directions from this Court. It seems clear that this is a perfect case in which to employ the procedure followed in the *Kiefer-Steewart* and *Story Parchment* cases. Other cases involving the antitrust laws in which the Supreme Court has directly affirmed the District Court's judgment in favor of the plaintiff after a reversal by the Circuit Court include *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652, and *Thomsen v. Cayser*, 243 U. S. 66, 37 S. Ct. 353, 61 L. Ed. 597.

The *Story Parchment* case goes much further than we ask the Court to go here. That case was also a private action brought under the antitrust laws where the jury brought in a verdict for plaintiff. On appeal to the circuit court, 37 F. 2d 537 (1st Cir. 1930), the judgment was vacated with directions to enter judgment for the defendants on the sole ground that the plaintiff had not sustained the burden of proving recoverable damages. Eight other assignments of error were urged before the circuit court but were not discussed. These questions were neither argued nor briefed before the Supreme Court. The Court, however, considered all of them and thereafter reinstated the jury verdict.

It is therefore submitted that this Court should remand the case at bar to the District Court with instructions reinstating the jury verdict and the judgment there entered.

Conclusion

The petitioner has pleaded and proved a classic case of geographic price discrimination under the Robinson Patman Act, through which the Congress has exercised to the full its plenary power over commerce. In reversing the

judgment of the District Court, the Court of Appeals engrafted on the law requirements not found therein or intended by the Congress, disregarded the law of the case, and substituted its own findings of fact for those of the jury.

The decision of the Court of Appeals should be reversed. The judgment of the District Court should be affirmed. For the reasons stated herein, we respectfully urge the Court to remand this cause to the District Court with instructions reinstating the jury verdict and the judgment there entered.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

Petitioner,

vs.

MEAD'S FINE BREAD COMPANY, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

- 1. Respondent's Restrictive Theory of the Scope of the Robinson-Patman Act Is Contrary to the Legislative History of the Interpretation of the Act by This and Other Courts.**

Respondent takes the position that because petitioner was wholly in intrastate commerce, necessarily the effect of respondent's price discrimination was strictly local, so that the effect on interstate commerce must be insubstantial and inconsequential. (Resp.'s Brief 17, 19, 25) The same idea is put by respondent in various other ways—if the

effect on interstate commerce is inconsequential, it is outside the power of Congress (Resp.'s Brief 17, 24, 33, 36)—the amended Clayton Act occupies no greater area than the Sherman Act, so it cannot extend to local or insubstantial or inconsequential acts (Resp.'s Brief 17, 19, 25)—sales at Fairwell, Texas, were not competitive with those in Santa Rosa, New Mexico (Resp.'s Brief 19, 24, 25, 29, 31)—anti-trust laws reflect only upon the subject of goods moving interstate (Resp.'s Brief 32)—personal grievances are not actionable (Resp.'s Brief 31)—the discriminatory sale must be made in commerce (Resp.'s Brief 22, 23)—and, that petitioner, being wholly in intrastate commerce, is without the protection of the amended Clayton Act. (Resp.'s Brief 30)

Petitioner has heretofore meticulously brought to the Court's attention the relevant history of the Robinson-Patman Act. For one to say that the amended Clayton Act did not occupy an area greater than either the Sherman Act or the old Clayton Act is a gross attempt to mislead this Court. The whole purpose of the original Clayton Act and its amendment, the Robinson-Patman Act, was to prohibit particular trade practices which the Congress found by experience in and of themselves were not covered by existing antitrust legislation and which had to be stopped in their incipency if monopolies were to be prevented from creation. *Standard Fashion Co. v. Magrane-Holton Co.*, 258 U. S. 346, 355, 42 S. Ct. 390, 362, 66 L. Ed. 1001; *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726, 738, 5 S. Ct. 961, 967, 89 L. Ed. 1320; *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 43, 68 S. Ct. 822, 826, 92 L. Ed. 1196; *Times-Picayune Pub. Co. v. U. S.*, 345 U. S. 594, 609, 73 S. Ct. 872, 880, 881, 97 L. Ed. 819; Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 4.

The constitutionality of the Clayton Act not only has not

been seriously questioned previously, but it has been specifically upheld as to one wholly in intrastate commerce. In *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F. 2d 150, 152 (CCA 2d), where the plaintiff New York corporation was a cosmetics dealer in the City of New York, and defendant was a cosmetics manufacture in interstate commerce who had been sued for treble damages for failure to provide plaintiff with a demonstrator contrary to Sections 13(d) and 13(e) of the Robinson-Patman Act, Chief Judge L. Hand stated:

"This ruling leaves open only two questions in the case at bar; first, whether it was an actionable wrong to deny the plaintiff, whose business is altogether intrastate, a favor which the defendant granted to 'agencies' in other states; . . . *True, the injury suffered by the plaintiff was to its intrastate business, but that is irrelevant. It is enough that the wrong be one of federal cognizance; its consequences are actionable whether or not they affect interests which are also of federal cognizance.* To recover for injuries done by a violation of the Food, Drug, and Cosmetics Act, 21 U.S.C.A. §301 et seq., for example, *the sufferer need not himself be engaged in any federal activity; federal legislation is passed for the benefit of all citizens whom it may affect; the means provided to protect their interests must be within the constitutional powers of Congress, but the interests protected need not be.*" (Emphasis added)

It is the fact, as necessarily found by the jury and approved by the Court of Appeals, that *respondent was itself in interstate commerce* that gave Congress the power to require that it not discriminate in price "where either or any of

the purchases involved in such discrimination are in commerce." (R. 329) The discriminatory sales at Santa Rosa, New Mexico, standing with the sales at Farwell, Texas, clearly, and, as the court below found, "read upon the literal language of the statute." (R. 329) It is the *effect on respondent*—elimination of its competitor and growth of monopoly—that the Robinson-Patman Act seeks to prohibit. In order to stop it, a cause of action was given to the injured competitor, petitioner in this case. That petitioner was not in interstate commerce, obviously has no bearing on the power of Congress so long as respondent is in interstate commerce. This was true even in Sherman Act cases. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 396, 27 S. Ct. 65, 51 L. Ed. 241; *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255, 61 S. Ct. 210, 85 L. Ed. 173. There is no mystery about this concept just as there is no justification for the attempted confusion of the court below on this issue. And here it should be noted that respondent erroneously states that petitioner makes no contention that there were sales in interstate commerce or that such sales in any way affected commerce. (Resp.'s Brief 16, 21, 29) This is simply not true. Respondent's acts did affect commerce and the high price leg of its sales were in interstate commerce.

The Court of Appeals, even as respondent, has been led into error essentially because it has refused to accept the plain words of the statute. There is *no* requirement that the particular discriminatory sales must themselves be in interstate commerce or that the sales be competitive as between themselves. Section 2(a) of the amended Clayton Act clearly provides that it shall be unlawful "to discriminate in price between different purchasers of commodities . . . where either or any of the purchases involved in such discrimination are in commerce . . ." In Senate Report 1502,

74th Cong., 2d Sess., this was emphasized in the following language:

"Section 2(a) attaches to competitive relations between a given seller and his several customers, and this clause is designed to extend its scope to discriminations *between interstate and intrastate customers*, as well as between those purely interstate. Discriminations in excess of sound economic differences involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them. When granted by a given seller to his customers in other States, and denied to those within the State, they involve the use of that interstate commerce to the burden and injury of the latter. *When granted to those within the State and denied to those beyond, they involve conversely a directly resulting burden upon interstate commerce with the latter.* Both are within the proper and well recognized power of Congress to suppress." (Emphasis added)

The trial court at the first trial stated after quoting the above, "I think that is exactly what the Robinson-Patman Act was designed for. The case comes clearly within its provisions." (R. 51, 53, No. 362, October Term 1951.) Where the language of the statute and the intent of Congress coincide, there can be no doubt of the meaning.

Both respondent and the Court of Appeals have great difficulty with the "effect" provisions which is attributable once again to a failure to completely absorb the statute. That part of the statutory provision, Section 2(a) reads as follows:

"... where the effect of such discrimination *may be* substantially to lessen competition or tend to create a monopoly in any line of commerce, or *to injure, de-*

destroy, or prevent competition with any person who . . . grants such discrimination . . . " (Emphasis added)

Even the Court of Appeals concedes that the price discrimination at Santa Rosa "may be said to have been made for the 'purpose of destroying competition or eliminating a competitor' ". (R. 329) How then, where respondent discriminates in price for the *decided purpose of destroying* its competitor or *eliminating* petitioner as a competitor, can it be said that Mead's is not within the specific prohibitions of Section 2(a)? The very fact that petitioner was a competitor of a respondent who was in interstate commerce caused an "effect" which the Congress prohibited under Section 2(a). There is *no* statutory requirement whatsoever concerning the injured local competitor or that the injured local competitor be in commerce to any degree, so it is obvious that the "effect" provisions apply to the *effect on respondent* who, by reason of its interstate character and discriminatory sales, is prohibited from utilizing a trade practice that Congress has determined will enable monopoly to flourish. While it is true that petitioner was one of the many little business men—low on the economic scale of importance—there is nothing in Section 2(a) of the Clayton Act or in Section 3 of the Robinson-Patman Act that restricts those statutes only to battles of the giants. Rather, the history of the Robinson-Patman Act points directly to an intent to protect and preserve the little businessman and in that fashion to stop monopoly in its incipency.

This Court has decided, after careful consideration, that the Robinson-Patman Act "does not require that the discriminations must in fact have harmed competition, but only that there is a *reasonable possibility that they 'may' have such an effect.*" *F. T. C. v. Morton Salt Co.*, 334 U.S. 37, 50, 68 S. Ct. 822, 830, 92 L. Ed. 1196; *Corn Products Co. v. F. T. C.*, 324 U.S. 726, 742, 65 S. Ct. 961, 969, 89 L. Ed. 1320.

It is indisputable that actual elimination of a competitor, as here, brings respondent within the very fact of reduced competition, and at the least, there is a certainty that a reasonable possibility exists that petitioner's destruction may have the effect of removing competition. That it took respondent almost eight months of below cost of production sales to remove petitioner as a competitor speaks well of the tenuous effort he made to fight off his unfair opponent.

It is evident that, on logic, the decided law as determined by this and other courts and in view of the recorded history of the Robinson-Patman Act, respondent's theories of commerce and the effects thereon of its wrongful acts are utterly lacking in support.

Respondent has cited some cases which petitioner does not believe are in point. In *Ewing Von Allmen Dairy Co. v. C. & C. Ice Cream Co.*, 199 F. 2d 898 (6th Cir.), c. d., 312 U. S. 689, 61 S. Ct. 618, 85 L. Ed. 1126 (Resp.'s Brief 19, 20, 30), an action was brought under the *Sherman Act* for treble damages as to acts complained of occurred prior to the passage of the Robinson-Patman Act. It is a typical example of why it was necessary to pass the Robinson-Patman Act as the *Sherman Act* simply required a degree of proof that was not realistic or practical.

Respondent places great reliance on *F. T. C. v. Bunte Bros., Inc.*, 312 U. S. 439, 61 S. Ct. 580, 85 L. Ed. 881 (Resp.'s Brief 23) which involved Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. §45(a), which empowered the Commission to prevent persons from "using unfair methods of competition in commerce." Section 2 of the Clayton Act was not in any way considered or involved. Bunte Bros. manufactured and sold candy in Illinois in break and take packages but not in other states. There were no interstate sales directly involved in the case. Section 5 of the Federal Trade Commission Act is entirely different from Section 2 of the Clayton Act, and it does not

contain the broad commerce coverage of the amended Clayton Act. For example nowhere in Section 5 of the Federal Trade Commission Act are there to be found any words equivalent to "in the course of such commerce, either directly or indirectly" or "where either or any of the purchases involved in such discrimination are in commerce" or "to injure, destroy, or prevent competition with any person who . . . grants . . . the benefit of such discrimination." 15 U.S.C.A. §13(a) (Emphasis added). The explicit purpose of the amended Clayton Act and its history clearly remove that statute from the obvious meaning of the law construed in the *Bunte Bros.* case, *supra*.

Respondent cites *Standard Oil Co. v. F. T. C.*, 340 U.S. 231, 236, 237, 71 S. Ct. 240, 243, 95 L. Ed. 239, apparently for the proposition that *all* sales have to be in interstate commerce. Such was not the case, and this Court was not called on to discuss the problem because there all the sales, both the low price and the high price legs, were in interstate commerce. In the instant case, the low price leg is intrastate while the high-price leg is interstate. Whether either leg is or both legs are in interstate commerce, it is within the provisions of Section 2(a) of the Clayton Act. *Corn Products Refining Co. v. F. T. C.*, 324 U.S. 726, 65 S. Ct. 961, 89 L. Ed. 1320; *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (CCA 2nd), *Standard Oil Co. v. F. T. C.*, *supra*.

Respondent has, it is believed, unsuccessfully sought to distinguish *Porto Rican American Tobacco Co.* and *Corn Products Refining Co.*, *supra*. In the *Porto Rican* case the injured competitor was solely in intrastate commerce as is petitioner here, although the discriminatory sale actually moved interstate. It is apparent that cigarette sales in the United States were not competitive with sales in far-removed Porto Rico, but if the Porto Rican competitor were eliminated, it would injure him and encourage American

Tobacco's attempt to monopolize. The illegal effect on American Tobacco, which was in interstate commerce, was the jurisdictional basis for application of the Clayton Act. In *Corn Products Co.* the offender made the same objection made by respondent here, i.e., that the sales to Curtiss Candy Co. at Chicago were intrastate which would not give the Commission jurisdiction because of constitutional grounds. This Court then stated that since some of the sales, *not advertising*, were in interstate commerce, there was a discrimination well within the power of the Commission to remedy. Further, that the volume of commerce affected is small does not constitutionally restrict the exercise of power under the Clayton Act. *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 606, 59 S. Ct. 668, 671, 83 L. Ed. 1014.

Respondent's authority fails of application to the facts of this case. The Robinson-Patman Act fully covers the wrong-doings of respondent. The judgment should be enforced.

2. Justification Is Not A Defense to This Cause of Action, and 15 U.S.C. §13(b) Is Not Applicable.

In its answer brief appellant has for the third time¹ in this Court attempted to raise the question of whether it was entitled to show that its price discrimination was justified by the existence of an alleged boycott of its products in Santa Rosa, New Mexico. These arguments have also been in all of respondent's briefs in the Court of Appeals. If there is any point which ought to have been laid at rest by the "law of the case" doctrine this is it.

¹ See Brief of Respondents in Answer to Petition for Writ of Certiorari, No. 294 Misc., Oct. Term, 1950; Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Brief in Support Thereof, No. 362, Oct. Term, 1951; and Brief for the Respondent, No. 121, Oct. Term, 1954, Part A Point V and Part B Assignment No. I.

Neither of the two points under which respondent argues this question in its present brief states wherein the trial court erred, and one of them (Part A, Point V) does not even do so in the argument. The argument under the other (Part B, Assignment No. 1), excerpts only two sentences from the court's lengthy instruction on this point. (R. 232-234) This is an attempt to mislead this Court, for examination of the whole instruction will show that the respondent *did* get before the jury all the evidence about the so called boycott, which the court admitted "to throw light upon the actions and conduct of the defendant," to determine if the price discrimination had the "effect . . . of lessening competition or tending to create a monopoly" or was "for the purpose of eliminating a competitor or destroying competition," and "to throw light upon the transaction in its entirety." (R. 233, 234) Petitioner objected to this instruction (R. 237) and to the admission of the evidence (R. 77, 90) and still thinks that this evidence should have been excluded altogether. The very word "boycott" is highly prejudicial to a jury, and the respondent used it to full advantage. It secured a much more favorable instruction on this point than was warranted.

In its first two briefs in this Court, respondent argued justification under the provisos of 15 U. S. C. § 13(a). Now for the first time it tries to justify its acts under 15 U.S.C. §13(b), contending that this section justifies *any* price discrimination made in good faith, merely shifting to the discriminator the burden of showing justification. This is changing horses in midstream which is not permissible. But notwithstanding the naivete of this theory is readily apparent. In the first place, §13(b) applies only to proceedings before the Federal Trade Commission, and this action is brought under §§13(a) and 13a. In the second place, the provisos of §13(a) are to be read into §13(b). *F. T. C. v. Ruberoid Co.*, 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081.

Any other construction would result in almost unlimited justification and would in effect nullify the specific grounds of justification of §13(a).

Giamco, Inc. v. Providence Fruit & Produce Bldg. Inc., 1st Cir., 194 F. 2d 484, cited by appellant, is not in point. It does not even involve the Robinson-Patman Act or the Clayton Act which it amended.

Respondent attempts, in Part A, Point V, to resurrect the long-dead issue of whether its alleged justification of meeting a so-called "boycott" can be squeezed in under the fourth "existing goods" proviso of §13(a) as a "response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." In the first trial the District Court succumbed for this argument and dismissed the complaint at the close of plaintiff's case in chief. The Court of Appeals ignored this obviously untenable ground in its first opinion, 184 F. 2d 338, and in its second, 190 F. 2d 540, said:

"It appears to us that the proviso cannot be given such a broad meaning. It is evident that it deals with special situations in connection with specific lots of goods which are of a perishable nature or become obsolete with the seasons or distress sales under court process or goods sold when a business is discontinued in good faith. The exceptions are not confined specifically to those set forth but the plain language of the statute limits the exceptions to those which are 'such as' or similar to those named. The changed market conditions caused by the understanding of the retailers in Santa Rosa to purchase only Moore's bread is not 'such as' or similar to the exceptions named."

Even the specially concurring opinion of Chief Judge Phillips, referred to by respondent at p. 37, went only so far as to say that Mead ought to be allowed to "justify by showing it reduced its price in good faith solely to break the boycott and not to destroy competition or to create a monopoly." Ibid., p. 542. This is just what the trial court did. The issues having been found by the jury in favor of petitioner, it must be assumed that it determined that Mead did have such a purpose or that its acts would have such an effect.

3. There Is Substantial Evidence to Support the Jury's Verdict for Damages and the Trial Court's Award of Attorney Fees.

Respondent attacks the verdict of the jury on the grounds that the market value of the bakery was greater after the price discrimination than before, that there was no certainty that petitioner would have made a profit, and that the verdict in any event was excessive. These will be dealt with in the order presented by respondent.

First, respondent says that the market value of petitioner's bakery was greater after the unlawful act than before, so there could be no damage. Petitioner believes this argument to be facetious. Both petitioner and Lehn Englehart testified that due to the rise in cost of steel and labor between 1947 and 1951 the value of physical equipment appreciated rather than depreciated. (R. 44, 161) However, we have this law suit because petitioner *lost* the equipment and his business was compelled to close on February 28, 1950. (R. 49) The only possible effect of this testimony is to show that petitioner lost the *undepreciated* value of his equipment. To say that one who loses his bakery, his business, goodwill, and ends up with an indebtedness of \$4,013.62 has lost nothing because economic conditions were such that his physical assets had not depreciated,

is to beg the question. (R. 49, 58) At this point it should be noted that respondent is attempting to take advantage of an obvious misprint in the record at page 49 where it reads that petitioner was "solvent" at the time he closed business. He was obviously "insolvent" at that time, and this error was brought to the attention of the Court of Appeals in the Brief of Appellee, page 44. Petitioner questions the propriety of respondent's effort to mislead the Court on this point. Again respondent attempts to mislead when it states that petitioner did not tell what he salvaged. (Resp.'s Brief 64) The record clearly shows that petitioner had one old Chevrolet panel truck of a value of \$550 and odds and ends of unmerchandiseable equipment. (R. 57, 58) If respondent wanted to explore further, he could have on cross-examination. In any event petitioner testified that the physical value of his equipment was \$15,559.34 and the going concern value was \$23,459.34. (R. 43, 44) Lehn Englehart, a qualified expert in this field, testified that the physical value of the plant was \$20,000. (R. 160) Respondent introduced absolutely no evidence on the subject of value or profits. Insofar as this record is concerned, there is not an iota of evidence to controvert petitioner on the damage issue. The jury, thus, had no alternative but to return a verdict for petitioner.

Second, respondent asserts that there was no certainty that petitioner would make a profit, therefore lost profits are not a proper item of damage. Along the same tenuous theory respondent casts in the idea that petitioner refused to compete, when in fact he fought respondent until February 28, 1950, and until he was economically exhausted. The real truth is that not only did petitioner compete, but he competed in the face of a vicious and determined price cut. The ability or inability of petitioner to make a profit without the illegal acts of respondent was made difficult

of proof because of respondent's acts, not because of anything that petitioner had done. This petitioner had the right to stay and compete with this respondent acting within the law—not without the law as it did. Respondent's acts denied petitioner this right. It is settled by this Court that under these circumstances respondent cannot complain. In *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 562, 563, 51 S. Ct. 248, 250, 251, 75 L. Ed. 544, the Court stated:

"Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

. . .

"... while the damages may not be determined by speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. *The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.*" (Emphasis added)

This doctrine followed that set in *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359, 379, 47 S. Ct. 400, 71 L. Ed. 984. In turn the Tenth Circuit Court of Appeals followed it in a very recent case, *Kobe, Inc. v. Dempsey Paper Co.*, 198 F. 2d 416, 425-427, c. d., 344 U. S. 837, 73 S. Ct. 46, 97 L. Ed. 651. The case here is much stronger than that adjudged in the *Kobe* case and *Story Parchment case*; because here not only did petitioner have an established plant and financial setup, but he also had a record of successful experience in the same business which was lacking in the other two cases.

No doubt with tongue in cheek, respondent argues at pp. 72, 73, 76, and 77 of its brief that petitioner's loss of profits during the period of the price discrimination was only \$299.72, that being 10 percent of the difference between petitioner's sales of bread in Santa Rosa during the price cut and during the corresponding period of the preceding year. (Petitioner testified that 10 percent of gross dollar volume was the normal or expected profit in the bread baking business (R. 71, 73, 119, 120), and Mr. Lehn Englehart, an expert witness, had testified that it would be 10 to 12 percent (R. 156-157)).

A glance at the large graph, Pl. Ex. 1, which is not in the printed record but has been filed with the clerk of this Court, will show the fallacy of this specious argument. After a period of readjustment while installing new machinery, (R. 43, 118) *petitioner's business was rapidly increasing* in volume before respondent's price cut, and he testified (R. 120, 121) that his volume would have been much *greater* during the period from September 3, 1948, to April 26, 1949, but for the price discrimination. He is certainly not limited to a comparison with the prior year, and neither do his recoverable profit losses end on April 26, 1949. As the trial court instructed the jury (R. 230,

231, 243), he may recover profit losses which were the after-effect of the price discrimination up to the day he went out of business February 28, 1950. Further, petitioner gave a complete explanation for the loss in profits which was apparently accepted by the jury. (R. 56, 118, 119) On a gross of \$74,270.52 from February 1, 1949, to February 28, 1950, petitioner would have made a minimum net of \$7,427.05 which does not appear to be an excessive return on his investment, labor, and experience.

Third, respondent states that the damages and attorney fees are excessive. The verdict was only for \$19,000. It is the trebled figure that appears large, not the actual verdict. The basis for the verdict has been dealt with previously. This Court has stated in this connection that "... the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 566, 51 S. Ct. 248, 252, 75 L. Ed. 544. The statutory authority for recovery is unusual because it provides that one injured in his "*business or property*" may sue therefor. 15 U.S.C.A. 115. Respondent apparently takes the position that "business" means only "profit". There is nothing in the statute that would indicate such a restriction because if Congress meant only "profit", it easily could have said so. By *not* using the word "profit" Congress undoubtedly meant that "business" should be synonymous with "revenue". Petitioner here has lost not only revenue but profit too. The recovery provisions were meant to be broad, as the history of the Act indicates that civil suits for damages were to be an additional deterrent to the prohibited practices. Respondent introduced no evidence to negative or lessen the figures supplied by petitioner. Under these circumstances

a charge of excessive damages should not be given serious consideration. That the Court of Appeals refused to even comment on this issue is indicative that it has no merit.

Respondent makes several arguments presumably in its plea for reduced damages. One is that the price cutting had nothing to do with petitioner's business failure. Reducing the price of a staple, like bread, in half and well below the cost of production, as a matter of common sense could not keep from injuring a competitor. The jury had all the evidence and this argument before it and found that this suggestion had no merit. Respondent further states at page 31 of his Brief that it is good and there was no evidence that it picked off its competitors or practiced similar illegal acts at other places. This is a point which petitioner would have been delighted to explore in the courtroom had the elementary rules of evidence permitted the introduction of such facts. Obviously such facts are not admissible in a case like this. Finally, respondent argues that it could not dictate prices in Santa Rosa or any other place. It is evident that half-priced bread will necessarily set the market, if not the price, because no other bread will be bought, so the effect is the same as if the price were set. Respondent fails to help itself by resort to such specious theories.

Respondent finally states that \$11,400 is an unreasonably high attorney fee. This represents 20% of the trebled damage figure of \$57,000. At the time that fee was set, this case had been twice tried, briefed and argued at Oklahoma City before the Court of Appeals, petition for rehearing filed, petition for certiorari made to this Court, and after the second Court of Appeals opinion a brief in opposition to certiorari was filed. This is about as thorny a road for a lawsuit as is imaginable and speaks well for the time and labor involved. The novelty and difficulty of the ques-

tions presented are reflected in the granting of certiorari. The amount involved in this controversy is substantial. That the questions involved are novel and difficult is evident. Respondent should not be so ungenerous with petitioner's counsel because respondent asked for \$7,500. attorney fees in his First Amended Counterclaim which was later dismissed by the trial court. In comparison with the presumed conservative standards of respondent's counsel, the fee set by Judge Carl A. Hatch, who was an outstanding attorney before going on the bench, is reasonable if not low. The best discussion of the method of arriving at attorney fees petitioner believes will be found in *American Can Co. v. Paducah Canning Co.*, 44 F. 2d 763, 771 (CCA 7th), the elements for consideration of which have already been discussed. Petitioner has been unable to find a case setting attorney fees in a situation analagous to the case at bar, but there are numerous cases not analagon, where they have been set. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F. 2d 846 (CCA 8th); *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 698; *William H. Rankin Co. v. Associated Bill Posters*, 42 F. 2d 152, c. d., 282 U. S. 864, 51 S. Ct. 37, 75 L. Ed. 765; *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d 561 (CCA 8th) c. d., 342 U. S. 909, 72 S. Ct. 302, 303, 96 L. Ed. 680; *American Crystal Sugar Co. v. Mandeville Island Farms*, 195 F. 2d 622, 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328; *Blackhurst v. Johnson*, 72 F. 2d 644 (CCA 8th); *Merchants' & Manufacturers' Securities Co. v. Johnson*, 69 F. 2d 940 (CCA 8th), c. d., 293 U. S. 569, 55 S. Ct. 80, 79 L. Ed. 668. Respondent twice argued this case after trial before the District Court and any failure to adduce evidence, if such be permissible, on the subject of attorney fees cannot be attributed to lack of opportunity. Not only does petitioner feel that the attorney fees awarded are rea-

sonable, but that additional attorney fees should be awarded for services in the Court of Appeals and in this Court.

4. Cases Cited by Respondent Regarding Multi-Corporate Combinations Do Not Support Its Contention That Courts Cannot Look Behind A Facade of Separate Corporate Entities to Determine Whether the Combination Is In Interstate Commerce.

It is not difficult to find cases in which courts have made general statements to the effect that, as rather loosely paraphrased by respondent at p. 43 of its brief, they "will look behind a multi-corporate set-up only if there is evidence of a purpose to evade a statute or to practice a fraud upon third persons." Generally such cases involve questions of agency, in suits over contracts or in negligence actions. Frequently, even in such cases, after paying lip service to the rule, the courts find grounds for looking behind the corporate entity, and this is true in some of the cases cited by respondent.

None of these cases touches top, bottom or sides of the issue of whether a family of corporations, operated as a unit across state lines, may evade the power of Congress to regulate interstate commerce simply by forming a corporation in each state in which it operates. Petitioner does not want to burden the Court by distinguishing each of respondent's cases individually. However, he would like to call the Court's attention to one of these cases because it actually supports petitioner's position.

State v. Swift, Tex. Civ. App., 187 S. W. 2d 127, cited at p. 44 of respondent's brief, was an action under the Texas anti-trust laws and therefore did not involve the interstate commerce issue, but the court points out that it is a *question of fact* whether a corporation is the "adjunct, creature, stooge, or dummy of another corporation" (*ibid.*, p. 133), and that this device should not be allowed to be used to

violate the antitrust laws or defeat the jurisdiction of the regulatory body.

Since it is primarily a question of fact, then, let us look at those in this case. The evidence on this point is not in controversy. Indeed, it all came from respondent's officers, although as part of petitioner's case in chief. Respondent offered no testimony bearing on this question.

Here we have a family of five corporations, four of them called simply "Mead's Fine Bread Company," but distinguished in the testimony as Mead's Fine Bread Company of Clovis, New Mexico; Mead's Fine Bread Company of Lubbock, Texas; Mead's Fine Bread Company of Chaves County (Roswell, New Mexico); and Mead's Fine Bread Company of Big Spring, Texas. The fifth, Mead Service Company, stipulated in the first trial to be in interstate commerce, originally was a defendant in this action, but the complaint against it was dismissed (R. 222) when it appeared that it was a training organization for the other four corporations and had nothing to do with the acts complained of in this action. (R. 125, 129, 130)

Bakeries operated by these corporations at Lubbock and Big Spring, Texas, and Clovis and Roswell, New Mexico, served a wide area of Eastern New Mexico and West Texas, all marketing their product under the common trade-name, "Mead's Fine Bread," (R. 135) using substantially identical wrappers (R. 136). The same trade name was used by other Mead bakeries at Amarillo, El Paso, Wichita Falls, San Angelo and Abilene, Texas, Albuquerque, New Mexico, and Lawton, Oklahoma, which the testimony showed were operated by relatives of the Meads connected with the five corporations listed above. (R. 133, 134)

Four men—Billy O. Mead, Mack Mead, W. L. Mead and E. E. Corcoran, were all stockholders and directors of four of these corporations (Lubbock, Clovis, Roswell and Mead

Service), and they distributed all of the offices among themselves. Billy O. Mead was president of the Lubbock corporation and Mead Service Corporation, and vice-president of the Clovis and Roswell corporations. Mack Mead was secretary-treasurer of the Clovis corporation and Mead Service Corporation. W. L. Mead was president of the Clovis corporation. E. E. Corcoran was vice-president of all four corporations. One other man, A. K. Miller, was a stockholder and director of the Roswell and Mead Service corporations. (R. 124, 125, 129, 130, 133, 164)

The organization of the Big Spring corporation is not so well developed in the record, there being a conflict of testimony of respondent's officers concerning it. Mack Mead testified that he and Billy O. Mead, his brother, owned stock in it "at that time," apparently referring to the time of the price discrimination, but that they and the other stockholders in the Clovis, Lubbock, Chaves County and Mead Service corporations had no interest in it at the time of the second trial. (R. 134) W. L. Mead, father of Mack and Billy O., also had an interest in the Big Spring bakery but sold it. Billy O. Mead testified in his deposition, taken in September, 1949, that he was a stockholder and director of the Big Spring corporation (R. 125). However that may be, it is clear that the Big Spring bakery was operated as part of the combine in 1948, for its flour was purchased together with that of the Lubbock, Clovis and Roswell bakeries (R. 279-283), and it participated in their combined advertising program. (R. 146, 148, 250)

Apparently the Big Spring bakery was traded to E. P. Mead (uncle of Mack and Billy O.) for one at Hobbs, New Mexico, early in 1949. (R. 148) Mack Mead said the Hobbs bakery was acquired by the Lubbock corporation in 1949 and merged with it in 1950. Its officers in 1949 are not identified in the record except that Corcoran was vice-president,

a stockholder and a director, but it appears that W. L. and Mack Mead were among its stockholders before the merger. (R. 135, 164)

To say that this family of corporations had interlocking directorates is putting it mildly. At least with respect to the Clovis, Lubbock, Roswell and Mead Service corporations, their directors were identical except for the minor role played by Miller. The same is true of the stock ownership.

All of these men except Miller lived in Texas, from where they directed the affairs of the New Mexico corporations, making frequent interstate trips for this purpose. This was especially true of Corcoran, the sales manager for the Clovis bakery, who gave the order for the price discrimination. (R.143) He resided in Lubbock, Texas, as did Billy O. and Mack Mead. (R. 129)

The five bakeries operated by this combination served adjacent territories in West Texas and Eastern New Mexico, so divided that they were not in competition with each other. (R. 138) In fact, they commanded a solid, contiguous block of territory lying athwart the Texas-New Mexico line. That they also commanded a sizeable slice of the bread business in that area is indicated by the fact that the Lubbock bakery boasted the largest oven between Fort Worth, Texas, and Phoenix, Arizona! (R. 149)

Before the Clovis bakery was acquired in 1946, the Lubbock bakery trucked bread into Clovis and still does in the event of breakdowns of equipment in the Clovis plant. (R. 142) The Clovis bakery trucked bread as far as Las Vegas, in north central New Mexico, in a large van-type truck. (R. 48, 143)

The common advertising program of the Clovis, Lubbock, Big Spring, and Roswell, bakeries offers one of the most

interesting examples of how these corporations were interwoven into a single enterprises. The deposition of Rex Webster (R. 146-154, 249-251) details how the advertising firm of Buckner, Craig & Webster handled this advertising program, billing each firm for the newspaper, radio, theater and outdoor advertising placed in the area in which each bakery operated. Although the accounting periods do not match exactly, it appears from the totals on pages 250 and 251 of the record that these four bakeries spent over \$80,000 in 1948 and the first nine months of 1949 with this one advertising firm, nearly \$38,000 of it being paid by the Lubbock corporation. The heavy share of the Lubbock corporation is accounted for by the fact that the bakery that used the advertising first, or originated it, paid for the mats, art work, etc., and Lubbock was usually the first. (R. 153) The others got a free ride as far as these services were concerned and usually had to pay only the time and space charges for the advertising placed in their respective territories. As Webster said, "... Lubbock ... is the focal point, at least so far as we are concerned." (R. 153)

The Hobbs bakery joined this advertising program in June, 1949, but its contribution was small. (R. 251)

According to Webster, advertising in the Lubbock and Clovis areas was generally authorized by Billy O. Mead, Mack Mead, or Corcoran. (R. 147)

The whole advertising program, as evidenced by the examples appearing in the record at pages 255-275, was intended to sell "Mead's Fine Bread," without regard to where it was baked. Usually the name of the bakery did not even appear. Webster and Mack Mead have testified to this common purpose. (R. 136, 137, 149) and the latter admitted that advertising done in one bakery's territory might help a Mead bakery located in an adjacent area. (R. 138)

If any more proof is necessary of the operation of these bakeries as a single enterprise, it is supplied by the two flour purchasing contracts appearing at pp. 279-283 of the record. Through these contracts "Mead's Fine Bread Co." (with no differentiation among the corporations) ordered flour from the Harvest Queen Mill & Elevator Company, Plainview, Texas, to be delivered at Lubbock, Big Spring, Clovis, and Roswell. The quantity of flour is defaced on one contract in the record, it actually being for 6,000 cwt., the other is for 5,000 cwt. Mr. Coreoran, vice-president, stockholder and director of all but the Big Spring corporations, has testified that this was a joint order of flour. (R. 169)

Appellant never contradicted or explained this evidence in any way. It is a fair assumption that these were not isolated examples or appellant's officers would have been quick to say so.

The evidence is overwhelming that these five corporations with their four (later five) bakeries, were operated as one enterprise. There remains to be considered, then, only the legal effect of such a combination.

It is obvious in this case that different corporations were organized in New Mexico and Texas in order to keep them out of interstate commerce. There is nothing illegal in this purpose, but the question is whether the plan was successful.

As observed in *Bausch Machine Tool Co. v. Aluminum Co.*, 2 Cir., 72 F. 2d 236, 239, 240, "Monopolies are frequently attained by the acquisition of the controlling interest in one corporation after another. [Citing authorities] *Although the acquisition of itself is not illegal, the stifling of competition by the application of the concentrated power is.*" (Emphasis added)

"Acts in themselves lawful considered alone, if part of a plan for controlling prices to eliminate competition in interstate commerce, are unlawful. *United States v. Socony*

Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 60 S. Ct. 618, 84 L. Ed. 852." *Louisiana Farmers Protective Union v. Great A. & P. Tea Co.*, 8 Cir., 131 F. 2d 419, 422.

In *Collins Baking Co. v. N.L.R.B.*, 5 Cir., 193 F. 2d 483, 485, a bakery organized as a separate corporation and, unlike Mead's Fine Bread Company, selling none of its products across state lines, was held subject to the National Labor Relations Act because it imported its raw materials and because it was part of an interstate combination of bakeries. There the Court said:

"Petitioner challenges the Board's jurisdiction because petitioner's products are sold wholly within the State of Alabama, where they are manufactured. But petitioner annually imports from other states, and used in producing its manufactured products, raw materials valued at approximately \$250,000, the flow of which in commerce would be directly affected by work stoppages. Imports as well as exports constitute interstate commerce within the meaning of the National Labor Relations Act, 29 U.S.C.A. §152 (6) (7). If the flow of commerce is obstructed by labor disputes, it makes no difference in principle whether the interference is with the inward or outward movement of goods. Commerce is affected in either case. . . . It follows that petitioner's business is subject to the Act, and the Board has jurisdiction of the matter in controversy. . . .

"Moreover, petitioner is an integral part of Campbell-Taggart Bakery Service Corporation, which own or control 49 baking companies located in numerous states. It also owns the controlling interest in petitioner's common stock. Petitioner markets its bakery products under the nationally advertised and copyrighted trade name of 'Colonial,' which trade name is owned by Campbell-Taggart. Through its control of petitioner's

Board of Directors, Campbell-Taggart in effect controls the business operations and labor practices of petitioner. *This close integration of ownership and operation with a bakery chain operating in several states effectively removes petitioner from the realm of purely local enterprise . . .* (Emphasis added)

The situation is practically identical in our case except that Mead's Fine Bread Company of Clovis, New Mexico, sold bread on a regularly scheduled delivery service to retailers in Farwell, Texas (R. 131), and did not confine itself strictly to sales within the State of New Mexico.

For application of this principle to other acts of Congress, see *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 58 S. Ct. 678, 686, 82 L. Ed. 936, 115 A.L.R. 105 (Utility Holding Company Act); *Northera Securities Co. v. U.S.*, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (Sherman Act); *A. H. Phillips, Inc. v. Walling*, 324 U. S. 490, 65 S. Ct. 807, 89 L. Ed. 1095, 157 A.L.R. 876, and *Walling v. American Stores Co.*, 3 Cir. 133 F. 2d 840 (Fair Labor Standards Act).

This principle has been applied to the Clayton Act from its inception. *U. S. v. United Shoe Machinery Co.*, (D. C.) 234 Fed. 127. Respondent has cited no cases which detract from the decisions cited above. In fact, two of respondent's cases could be cited by petitioner. They are *Stone v. Eacho*, 4 Cir., 127 F. 2d 284, and *E. Albrecht & Son v. Landy*, 8 Cir., 144 F. 2d 202. In *Stone v. Eacho* the court decided to "tear asunder the legal maze of corporate fiction" in a bankruptcy case, and in the Albrecht case the same result was reached in a tax case.

In the other cases cited by respondent, *Nichols & Co. v. Secretary of Agriculture*, 1 Cir., 131 F. 2d 651, *Esmond Mills v. Commissioner of Internal Revenue*, 1 Cir., 132 F. 2d 753, *Oul Fumigating Corp. v. California Cyanide Co.*, 3 Cir.,

30 F. 2d 812, and *State v. Swift*, Tex. Civ. App., 187 S.W. 2d 127, the rule for disregarding corporate entity was recognized but the facts were held not to justify application of the rule. None of these cases involved a fact situation similar to that in the instant case, and none, incidentally, concerned the federal antitrust laws.

The legal principle is so well settled that we need look only to the facts, and it is submitted that the facts in this case amply justify application of the rule. Here the various corporations were nothing but the alter egos of four men, and the acts of the corporation are in effect their acts. If four individuals engaged in such a business enterprise without benefit of a corporate smokescreen there could be no doubt but that they were in interstate commerce, and that should be the test in this case.

5. It is Immaterial in This Case that Regular Shipments From Clovis, New Mexico, to Farwell, Texas, Were Temporarily Suspended by Respondent During the Early Part of the Period of Price Discrimination.

Although the point was not properly raised or preserved, respondent now contends that, because it temporarily suspended the operation of its interstate bread truck route for a period which included the early portion of its price war in Santa Rosa, the trial court's instruction to the jury on the question of damages was erroneous. (Resp.'s Brief 25-31, 59-61)

In so doing, respondent apparently is oblivious of the fact that, if this argument is accepted, it jerks the rug from beneath its own feet on the issues of boycott and justification which it has attempted to raise. If respondent was not engaged in interstate commerce at the beginning of its below-cost price cutting, then it cannot claim the benefits of the justification provisos of the Robinson-Patman Act.

However, petitioner's case on the commerce issue does not rest on a single pillar. He contends also that respondent corporation was part of an interstate combination of baking companies with interlocking directorates, common majority stockholders, common trade name, a common purchasing arrangement, and a common advertising program, and that everything this corporate family did constituted interstate commerce or affected it.

The parties stipulated (R. 131, 132) that respondent operated, *on a regular schedule*, a bread route from Clovis, New Mexico, to Farwell, Texas, from September 18, 1946, until January 16, 1948, and from December 27, 1948, until the winter of 1951, and thus was not selling bread across the state line during 115 days of the 235-day price cutting period. It was in operation for a year and four months before and during the last four months of the price cut, as well as afterward.

It is reasonable to infer from the stipulation—and from the failure of respondent's officials to explain the matter further from the witness stand—that the suspension during the early part of the price cut was only *temporary*.

Be that as it may, it would be impossible to segregate petitioner's damages in the manner now urged by respondent. This is particularly true of the loss of his business. Who could say whether it was the first or second half of the price war that caused him to become insolvent? It is respondent's own wrongful conduct that has rendered difficult the ascertainment of the precise damages, and it is not entitled to complain. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S. Ct. 400, 405, 71 L. Ed. 652; *Storg Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544.

The case went to the jury under proper instructions (R. 221, 243), and the jury undoubtedly weighed the damage issue carefully. There is nothing about the size of their

verdict to indicate any tendency to favor the petitioner unduly. In fact, it can be justified on loss of the petitioner's business alone, without regard to lost profits or lost revenue, as discussed more fully elsewhere.

The court's first instruction (R. 231) on this point was met by a general objection from respondent (R. 240) which did not make it clear that it objected to permitting the jury to award damages accruing from September 3, 1948, to January 16, 1949. The court then gave a further instruction (R. 243) to which respondent interposed only the additional objection that the jury should have been required to "first find whether or not the plaintiff would have made a profit from the sale of bread." (R. 244) It cannot be said that the court was made aware of the objection now urged by respondent. Failure to object distinctly to a charge justifies an appellate court in refusing to consider the point. *Sherlin-Hixon Co. v. Smith*, 9th Cir., 165 F. 2d 170; *Farley v. Roberts*, 1st Cir., 138 F. 2d 518, c. d. 321 U.S. 788, 64 S. Ct. 786, 88 L. Ed. 1078.

Incidentally, respondent tendered no instruction on this point, and neither is it in the pleadings.

It should also be noted that this assignment of error does not coincide with the statement of points to be relied upon (R. 1-4) specified in accordance with Rule 75 (d) of the Rules of Civil Procedure, and respondent did not designate the complete record to be sent up on appeal. Apparently it thought a lot more of this point in retrospect.

Shaw's, Inc. v. Wilson-Jones Co., 3rd Cir., 105 F. 2d 331, cited by respondent at p. 60 of its brief, has no bearing on this case, and in fact counsel has taken a statement from it out of context.

Respondent's Part B, Assignment No. II (Resp.'s Brief 59-61) should be disregarded because it was not properly raised at the trial, was not preserved on appeal, and is not valid even if it was so raised and preserved.

6. Respondent Has Completely Misunderstood Petitioner's Contention Regarding Applicability of the "Law of the Case" Doctrine.

Petitioner does not, as respondent seems to think, contend that this Court is bound by the decisions of inferior courts on prior appeals. (Resp.'s Brief 45-47) As stated under Point II at pages 35-39 of petitioner's opening brief, which need not be repeated here, the peculiar history of this action justifies the assumption that this Court considered whether or not petitioner had pleaded and proved a *prima facie* case in the original trial when it granted certiorari the first time and remanded the case to the Court of Appeals for further consideration in the light of a specific case, and then, after the court below reversed itself, denied certiorari to the present respondent.

It is true that the Court of Appeals might very well have disposed of the second appeal in petitioner's favor under the "law of the case" as spelled out in its second opinion, but its failure to do so is not urged here as error. Cases cited by respondent are directed to the ordinary situation where an appellate court is asked to reconsider matters determined in a prior appeal, or where this Court simply has denied a prior petition for certiorari, and it is not necessary to discuss such cases here.

Petitioner contends that this Court should not go behind its mandate on the first appeal, especially in view of its subsequent denial of certiorari to respondent after the Court of Appeals, acting on this mandate, reversed itself and the District Court and ordered a new trial. Matters necessarily considered by this Court in taking jurisdiction—especially the commerce issue—should not be reopened, since the evidence in the second trial was for all practical purposes identical to that in the first.

In this connection, it is significant that respondent failed to take up petitioner's challenge on p. 39 of his opening brief to point out any substantial difference in the evidence adduced in the two trials. Undoubtedly it would have done so if it could have, for this is one of the most common defenses to the doctrine of law of the case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

vs.

Petitioner,

MEAD'S FINE BREAD COMPANY, A CORPORATION,

Respondent

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR THE RESPONDENT

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PART A

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I

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

vs.

Petitioner,

MEAD'S FINE BREAD COMPANY, A CORPORATION,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the Court of Appeals for the Tenth Circuit is reported at 208 F(2) 777.

Jurisdiction

Jurisdiction of this Court is invoked under Section 1254 (1); Title 28 U. S. C.

Statutes Involved

Section 2(a) of the Clayton Act (Title 15 U.S.C.A. Section 13(a)) is as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either

directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration

of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." 49 Stat. 1526.

Section 2(b) of the Clayton Act (Title 15 U. S. C. A. Section 13(b); 49 Stat. 1526) is as follows:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price of services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Section 13a, Title 15 U. S. C. A. (49 Stat. 1528) is as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a com-

petitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000.00 or imprisoned not more than one year, or both."

Section 4 of the Clayton Act (Title 15 U. S. C. A. Section 15; 38 Stat. 731) provides as follows:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

Questions Presented

PART A

The petitioner predicates his action upon Sections 13(a) and 13a of Title 15 U. S. C. A. (49 Stat. 1526 and 1528) and under such sections the following questions are raised:

(1) May Section 13(a) be extended to include intrastate activities having no adverse affect upon interstate commerce or having only an insubstantial affect thereon?

(2) May Section 13a be extended to include activities outside the flow of commerce between the states, and if so,

(3) May Section 13a be extended to include intrastate activities having no adverse affect upon interstate commerce or having only an insubstantial affect thereon?

(4) Did the Court of Appeals correctly determine, under the facts of this case, that the price cut in the

single town of Santa Rosa, New Mexico, did not in any substantial way adversely affect or threaten adverse affect to interstate commerce?

(5) Here the petitioner totally refused to compete with respondent or anyone else on any basis. The question, then, is presented: Are the Sections upon which petitioner bases his action available to a person who refuses to compete in an open and fair market?

(6) Was the boycott involved in this action a changed market condition affecting the market for or the marketability of respondent's goods within the fourth proviso of Section 13(a), Title 15 U. S. C. A.?

(7) Is the doctrine of the "law of the case" a limitation upon the power of a Court of Appeals to consider a matter previously before it but left open for determination at a later time?

PART B

(8) May the accused in a price discrimination action under Section 13(a) show justification for the sale of its products at a reduced price, where it appears that the sales at the reduced price were made in response to a boycott resulting in a destruction of its market?

(9) Did the Trial Court err in permitting the jury to take into consideration alleged losses during the time respondent was not engaged in commerce?

(10) Did the Trial Court err in permitting the jury to take into consideration loss of value of property, where the evidence conclusively shows a market value after the alleged wrongful act equal to the value before such act?

(11) Did the Trial Court err in permitting the jury to take into consideration alleged loss of profits, where the evidence failed to establish that the complaining party could have made a profit in the absence of the alleged wrongful act?

(12) Did the Trial Court err in permitting the jury to take into consideration an alleged loss of profit where the complaining party fails to furnish informa-

tion from which the jury could reasonably estimate the loss?

PART C

(13) Assuming that all other essential elements necessary to a recovery are present, did the Trial Court err in permitting a recovery in excess of nominal damages where the complaining party failed to show that he was actually injured as alleged by him?

(14) Did the Trial Court err in rendering judgment for petitioner in the amount of \$12,000.00 trebled where the petitioner failed to establish his alleged loss or damage?

(15) Did the Trial Court err in allowing petitioner an attorney's fee in the amount of \$11,400.00?

Statement of the Case

Respondent cannot accept petitioner's Statement because of inaccurate conclusions and omissions which give the Court an entirely erroneous picture of the factual situation and of the question which this Court, under the Writ of Certiorari, is required to pass on.

Succinctly the undisputed facts in this case are that the petitioner from some time in 1946 until February 28, 1950, was doing a purely local bakery business in the town of Santa Rosa, New Mexico, and the immediate surrounding area. R. 39, 40, 48, 214. The respondent is a New Mexico Corporation conducting in that State a bakery business with its plant at Clovis, New Mexico. At the time respondent first offered its bakery products to the retail grocery merchants in Santa Rosa on an unestablished date in January of 1948, it had not sold nor attempted to sell any of its goods in that town. On that date respondent started trucking its bread and other bakery products to Santa Rosa from its only plant in Clovis, New Mexico, to Santa Rosa, New Mexico, over a route entirely within that State. R. 47, 48, 74.

For a period of time prior to January 16, 1948, the respondent had sold a small percentage of its output in Farwell, Texas, but on January 16, 1948, it ceased any such sales until December 27, 1948 (R. 131), and hence from January 16, 1948, to December, 1948, respondent was not engaged in interstate commerce. R. 131. Its activities and sales during that period were purely local.

Either shortly before or after January 16, 1948, (The Record is not clear) the respondent, for the first time started trucking its bread and other bakery products from Clovis to Santa Rosa and its products were purchased by most, if not all, of the retail merchants in the town and was placed on their shelves in competition with the petitioner's goods and at the same price. R. 47, 76-77. The commodities of the two parties were sold in open and fair competition until September 3, 1948. R. 75, 82, 89.

Petitioner, according to his own testimony, concluded on the first day that respondent offered its products to the merchants in Santa Rosa, that there was not enough business for the two competitors and decided voluntarily to move to another town in New Mexico. R. 76-77. Petitioner leased a building in Tucumcari in June (R. 76) and a month before he planned to move he informed his Santa Rosa landlord of his action. R. 76. The landlord, together with others, asked him what it would take to keep him in Santa Rosa and Mr. Moore replied that he didn't know of anything that they could do to keep him there; but when he was offered all of the business in town he decided to stay if the merchants "would support me one hundred per cent." R. 77. A petition was prepared and all "except one store signed the petition one hundred per cent." R. 76, 77. There is no doubt as to the intent of the petition or what was meant by "support me one hundred per cent", because the petitioner, Mr. Moore, testified that the merchants

had to "quit buying Mead's bread", "just buy his bread", so he "would not have any competition." R. 79, 80, 87.

Petitioner testified that two meetings were held in connection with the boycott, one of which was held in a "little back room" to decide on what day the boycott would become effective—"get them all together so that it would all be effective on the same day." R. 86. At this meeting it was decided that the boycott would become effective on September 3, 1948 R. 90. This was approximately 7 months after respondent Mead's) first offered its bakery products in the town of Santa Rosa.

The petitioner further testified that during this seven months period he considered Mead's competitive methods and practices fair in every respect. R. 75, 82, 89. He stated repeatedly that he could not *exist* with Mead's in the market with him, (R. 82, 84, 89), and emphatically stated that he had to have all of the business in Santa Rosa to "*exist*". R. 82, 89. He testified that with Mead's in the market with him on a fair basis his business was not profitable (R. 212) and that he could no "*exist*" if he had to compete with them or anyone else. R. 82. Having Mead's as a competitor on a fair basis forced him to the conclusion that he had only two alternatives remaining—"either close down or move out." R. 82, 84.

The boycott struck on September 3, 1948, and Mr. Moore testified that on that day all of the accounts Mead's had in Santa Rosa refused to buy Mead's products with the exception of Lillie's store. R. 80. He stated that he later heard that Jack's store continued to buy (R. 87, 90) but at page 93 of the Record he agreed that "Jack's" continued to be his customer, exclusively, until he closed his shop.

Mr. Corcorran, Vice-president of respondent, testified that on the day the boycott struck he went to Santa Rosa

and found that the merchants were refusing to purchase all of respondent's goods and that his efforts to persuade them to allow respondent to do business in the town were wholly unsuccessful. R. 170. Confronted with this he cut the price of bread only and only in Santa Rosa to 7 cents per pound. R. 171-172.

Mr. Moore testified that Mead's cut the price of *white bread only and only in the town of Santa Rosa* (R. 48, 97), that he lost no sales on any product, including bread, outside the town of Santa Rosa (R. 49) and lost no sales of any product other than bread in Santa Rosa. R. 69. He stated that his only complaint concerned bread sales in the town of Santa Rosa. R. 48, 97. After the price on bread was cut, Mead's regained a part of its old customers, but Mr. Moore agrees that the boycott continued to be at least four-tenths effective after the price of bread was raised by respondent on April 26, 1949, (R. 48) and until he closed his shop. R. 94. After the price was raised by respondent in Santa Rosa, Mr. Moore cut the price of bread in Tucumcari, New Mexico, where he and the respondent were also competitors. R. 214. Petitioner's products were never at any time removed from any store shelf and when he closed his bakery on February 28, 1950, Superior Baking Company took his place in the market. R. 175.

The Secretary-Treasurer of respondent testified that the total sales made across the State line during the entire period of the price cut was 1.7 per cent of respondent's total business during the term of such price cut. R. 216-217.

Petitioner then instituted this action in the District Court for treble damages. The District Court, without considering the question hereafter presented as to whether respondent should be considered within the meaning of the Robinson-Patman Act to have been in commerce so far as the action in Santa Rosa was concerned, held that its ac-

tion came within the fourth proviso clause of Section 13(a) of the Robinson-Patman Act and was therefore excluded. Petitioner appealed to the 10th Circuit and that Court, without considering the ground on which the District Court had ruled, affirmed (184 Fed. 2d 338) upon the ground that it appeared that the plaintiff was in *pari delicto*. This Court having decided in 340 U.S. 944, 71 S. Ct. 528, 95 L. Ed. 68, that *pari delicto* was not a defense to an action under the Anti Trust Act, granted certiorari, and in the same order, remanded it to the Circuit Court for further consideration. On reconsideration, a majority of the Court held that under the ruling of this Court a question of fact was presented and remanded the case for trial to the District Court (190 Fed. 2d 540). The trial resulted in a verdict of \$19,000.00 for the petitioner, which the Court trebled, adding \$11,500.00 as counsel fees. Petitioner appealed to the 10th Circuit on grounds including the basis of that Court's decision and on assignment of numerous errors of the trial court, each of which we believe was entirely sound.

The Circuit Court agreeing with us on our first point, and of course, found it unnecessary to pass upon any of the assignments of errors; although we believe that it or any other tribunal considering them would sustain each and all of them.

Petitioner sought and obtained a Writ of Certiorari from this Court, its petition being necessarily addressed only to the ruling of the Circuit Court that the petitioner was not entitled to recover. Nevertheless, petitioner, in his brief, asked the Court not only to reverse the Circuit, but to reinstate the judgment of the District Court. While we feel confident that this Court will reach the conclusion that the judgment of the Circuit Court was correct and will be affirmed, it is obvious that if it should reach a contrary

conclusion, it could not in justice reinstate the judgment of the District Court without considering and passing upon the assignments of error, each of which, as stated, we believe is well taken, or remanding the case to the Circuit Court for the purpose of that Court considering it. As we understand the rule, the question as to these assignments of error was not within the writ and would not ordinarily be considered by this Court; and that the ordinary procedure would be to remand it to the Circuit. Since the petitioner could not very well include them in his petition, and in case this Court should feel that under the circumstances it should consider and pass upon them, we have divided our argument into three parts, the first dealing with the right of petitioner to recover at all, the second, briefly outlining the specifications of error and, also briefly, the reasons we believe that each is well taken. The third part is placed at the latter part of the brief for the sake of brevity in order that the Court will have the benefit of the accumulated authorities, argument and facts having a bearing upon the points raised in determining the liability, if any at all, of respondent.

Unless otherwise noted, all emphasis through the argument is ours.

SUMMARY OF THE ARGUMENT

I

1. Congressional power to regulate an intrastate activity is limited to those which in some way have a substantial effect upon interstate commerce; and the Court of Appeals correctly determined that under the factual situation of this case, the sales of bread by the respondent at a reduced price in the single town of Santa Rosa, New Mexico, did not burden or threaten a burden to interstate commerce.

2. The discrimination of which petitioner complains in-

volves wholly intrastate sales of bread baked in Clovis, New Mexico, and sold in Santa Rosa, New Mexico; but during the first 3 months and 24 days of the price cut respondent made no sales across a state line. The basis of the alleged discrimination being sales, and no sales of any character having been made in interstate commerce during this period no violation could possibly have occurred. Even under the petitioner's theory, no discrimination could have occurred because of the absence of sales across a state line. Even though during the latter part of the period of the price cut respondent started making a few sales in Farwell, Texas, Section 13a of Title 15 U.S.C.A. could not apply because such sales in Farwell were not at a lesser price than was charged elsewhere. Further Section 13(a) could not apply for the reason that it does not appear that the wholly intrastate sales in Santa Rosa in any way affected or threatened an adverse effect upon interstate commerce.

3. The complained of sales in Santa Rosa were in no way related to or affected interstate commerce. The petitioner's business was wholly local and is not shown to have been in any way connected with interstate commerce. The few sales made by respondent from its bakery in Clovis, New Mexico, in Farwell, Texas, were made to local retailers unrelated to New Mexico customers of either the respondent or petitioner. The alleged discriminatory sales in Santa Rosa were not dependent upon the Texas sales, and the aims of respondent were wholly local.

4. The absence of the usual evil consequences flowing from monopoly and control of commerce affirms the Circuit Court's conclusion that the boycott-price cut war was wholly local having no impact upon interstate commerce.

5. The decision of the Court of Appeals in this case in no way conflicts with any case cited by petitioner, and in

particular with Porto Rican American Tobacco Co. vs. American Tobacco Co., 30 F(2) 234, Cert. Den.; 279 U.S. 858; 49 S. Ct. 353; 73 L.Ed. 997; or Corn Products Refining Co. vs. F.T.C., 324 U.S. 726; 65 S. Ct. 961; 89 L.Ed. 1320, and other cases cited by respondent.

II

The mere fact that the stockholders of respondent lived in Texas and owned stock in other corporations engaged in a bakery business in Texas, and the fact that such corporations used the name "Meads" in a similar manner, is insufficient to justify a disregarding of the separate corporate entities and make one the instrumentality of the other.

III

The Court of Appeals, in its earlier opinions, left open the question of whether or not the complained of sales in the single town of Santa Rosa, New Mexico, affected interstate commerce. In any event the doctrine of the "law of the case" does not limit the power of a court to reconsider a matter previously determined by it.

IV

The purpose of the Sections upon which petitioner bases his action seeks to protect the public from the evils flowing from destruction of competition; however, the petitioner, being totally unwilling to compete with the respondent or anyone else on any basis is not a competitor that could be injured or destroyed within the provisions.

V

Section 13(a) of the Robinson-Patman Amendment provides that a price may be reduced when such reduction is

made in response to a changed condition "affecting the market for, or the marketability of the goods concerned." The petitioner having admitted that the respondent reduced the price of its bread in response to a boycott which destroyed its market and admitted that the boycott continued at all times and for 10 months after the price was raised, the act of the respondent in making the complained of sales was not a discrimination within the provisions of the Act.

PART B

ASSIGNMENTS OF ERROR BROUGHT FORWARD IN SUPPORT OF THE REVERSAL OF THIS CAUSE BY THE COURT OF APPEALS.

I Section 13(b), Title 15 USCA, provides that the person charged with a violation of Section 13(a) may avoid the penalties of the act by showing justification. The Trial Court erred in refusing respondent's requested instruction on the matter of justification, where the respondent's Vice-president testified that the bread was sold at the reduced price for the sole purpose of regaining its lost market; and where the petitioner admitted that the price cut was made in response to the boycott destroying respondent's market and admitted that the boycott continued at all times until nearly a year after the price was raised.

II During the first 3 months and 24 days of the price cut, petitioner made no sales across state lines. Under such circumstances the Trial Court erred in permitting the jury to take into consideration alleged losses accruing during such period.

III The evidence in this case shows that the value of petitioner's property was greater after the alleged illegal act than before such acts. Petitioner having failed to prove either the fact of damage or furnished data from which his loss could be reasonably estimated, the Trial Court erred

in permitting the jury to take into consideration loss of value of property in arriving at its verdict.

IV The petitioner sought to recover lost profits on the sale of bread, but petitioner: (1) was unwilling to say that he ever made a profit on bread (2) unwilling to say that he could have made a profit on bread in open competition, (3) admitted that his bread business was not profitable when in equal competition with respondent and (4) utterly failed to establish that he could have made a profit in the absence of the price cut. Under such testimony the petitioner failed to establish the existence of the thing sought to be recovered, and the Trial Court erred in permitting the jury to take into consideration alleged lost profits in arriving at its verdict.

PART C

I The petitioner has failed to establish lost profits and loss of value of property as summarized in III and IV above, and assuming that all other essential elements to recovery have been shown, his recovery is limited to nominal damages.

II The verdict of the jury was excessive and should be reduced for the reason that the petitioner sought to recover (1) an alleged loss of profits and (2) an alleged loss of value of property, but failed to prove the loss of either. Further the Trial Court's allowance of an attorneys fee of 60 per cent of the amount of the jury verdict was excessive and should be reduced.

Argument**PART A****I**

THE DECISION OF THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE SITUATION PRESENTED IS WHOLLY LOCAL AND NOT VIOLATIVE OF SECTION 13 (a), TITLE 15 U. S. C. A. (SECTION 2 OF THE CLAYTON ACT) OR SECTION 13a, TITLE U. S. C. A.

1. The Federal power of regulation may not be extended to embrace a wholly local activity having no effect upon interstate commerce or having an insubstantial effect upon such commerce.

The petitioner makes no contention that the complained of sales made by respondent in Santa Rosa, New Mexico, were in intrastate commerce, nor does he contend that such sales in any way affected such commerce. His entire position is that respondent is liable under the Sections because over three months after its initial price cut, respondent commenced making a few sales across the State line in Texas. This position is taken by petitioner in the face of the admitted fact that the sales at the reduced price in Santa Rosa were made for the sole purpose of combating a boycotting by the Santa Rosa merchants excluding respondent from its lawful market.

The power of Congress to regulate commerce carries with it the power to regulate any intrastate or local activity which affects interstate commerce, *U.S. vs. Frankfort Distilleries*, 324 U.S. 293; 65 S. Ct. 661; 89 L. Ed. 951; *Mandeville Island Farms vs. American Crystal Sugar Co.*, 334 U.S. 219; 68 S. Ct. 996; 92 L. Ed. 1328. But effect alone is

not sufficient, for when it is determined that something forbidden has occurred in the course of intrastate or local activity, and an actual or threatened effect upon interstate commerce is established, the "*vital question*" becomes whether the effect is substantial or inconsequential; and if such effect is inconsequential, the activity lies outside the regulatory power. *Mandeville Island Farms vs. American Crystal Sugar Co.* (supra); *U. S. vs. Wrightwood Dairy Co.* 315 U.S. 110; 62 S. Ct. 523; 86 L.Ed. 726; *Wickard vs. Filburn*, 317 U.S. 111; 63 S. Ct. 82; 87 L.Ed. 122.

The case before the Court involves Section 2 of the Clayton Act (15 U.S.C.A. 13) and Section 13a, Title 15 U.S.C.A., neither of which can extend beyond the conferred powers of the legislative body enacting the provisions. This Court has held that the Sherman law embodies the maximum power and authority of Congress under the Constitution.

"Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied, it 'exercised all of the power it possessed' ", *U.S. vs. Frankfort Distilleries*, 324 U.S. at 298, 65 S. Ct. at 664; also *Apex Hosiery Co. vs. Leader*, 310 U.S. at 495, 60 S. Ct. at 993; 84 L.Ed. 1311.

It follows then that Congress in enacting the Clayton law and the amendments thereto including Section 13a could not "occupy" any greater area than that occupied by the Sherman law; and that if Congress by the terms of the provisions in question left no "area of its constitutional power unoccupied" the provisions, as in the case of the Sherman Act, may not be extended to local activities having no effect upon interstate commerce nor to local activities having an insubstantial and inconsequential effect upon such commerce. The principal is recognized in *U.S. vs. Frankfort Distilleries* (supra) cited by petitioner on page 18 of his brief. The entire quotation set out in his brief is a spe-

cific recognition of the fact that Congress in the Sherman Act has exercised its full constitutional power but did not touch local transactions which did not have any substantial effect upon interstate commerce. The first portion of the portion quoted by petitioner reads:

"—there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states. It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust Laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce." 324 U.S. at 297; 65 S. Ct. at 663; 89 L.Ed. 951.

In *Atlantic Co. v. Citizens Ice & Cold Storage Co.*, Fifth Cir., 178 F(2) 453, Cert. Den., 339 U.S. 953; 70 S. Ct. 841; 94 L.Ed. 1365, Atlantic Ice Company brought suit against Citizens Ice & Cold Storage Company to enjoin defendants from cutting prices in the sale of its ice to local customers and sales to truckers and railroads engaged in interstate commerce. The plaintiff charged violation of Section 13a of The Robinson-Patman Act (Title 15 U.S.C.A.) and Section 2 of the Sherman Act (15 U.S.C.A. Sec. 2) alleging that the defendant had attempted to monopolize part of the trade and commerce among the several states, and charging that defendant in the course of interstate commerce made the sales for the purpose of destroying competition. The Court in holding the situation to be wholly local stated:

"It remains true, however, that the distinction between intrastate and interstate commerce still exists; that 'it is the effect upon the interstate commerce or its

regulation, regardless of the particular form which the competition may take, which is the test of federal power', (Citing *U.S. vs. Wrightwood Dairy Co.*, supra; *Wickard vs. Filburn*, supra; *Mandeville Island Farms vs. American Crystal Sugar Co.*, supra) and that the question of whether the effect on interstate commerce is substantial and is still a controlling one." 178 F(2) at page 457.

The court concluded that the "effect, if any, upon interstate commerce was insubstantial, inconsequential and remote; and that the finding, that the price cutting was done to impose restraints on, or that it substantially affected interstate commerce, is without support in the evidence." 178 F(2) at page 458.

In that case there were price cut sales to persons who used the ice in furtherance of their interstate activity and was undoubtedly carried interstate. These sales were made directly in competition with the plaintiff; yet, the court found that the price cutting had only an incidental and inconsequential effect on interstate commerce. The interstate commerce in the present case is far removed from the price cut and the few sales made by respondent in Farwell, Texas, were not competitive in any way to the petitioner.

In *Ewing-Von Allmen Dairy Co. v. C. & C. Ice Cream Co.* (6th Cir. 1940), 109 F(2) 898; Cert. Den. 312 U.S. 689; 61 S. Ct. 618; 85 L.Ed. 1126, the appellant was a corporation selling ice cream cones in and about Louisville through soda water fountains and other retail outlets. Sometime after it had established its market, appellee was organized, first as a partnership and later as a corporation, for the purpose of selling ice cream cones, and opened stores at various points in Louisville for this purpose. Appellant, in an endeavor to retain its market, opened numerous retail stores and commenced nearly doubling

the size of its ice cream in cones, still selling them at five cents. The appellee was not in commerce, but the appellant sold a small percentage of its ice cream in other states. Although ice cream products of both parties were produced in Kentucky, the gelatins and flavorings were manufactured in other states. The appellee brought action for damages under the Clayton Act and obtained a verdict for \$1,000.00, which was trebled. In reversing the judgment, the 6th Circuit said, in part:

"The sole question is whether acts of the appellants in competition with the appellee have such a direct relation to interstate commerce as to affect and burden it within the purview of Title 15, Sections 1 and 2, U.S.C., 15 U.S.C.A., Sections 1, 2, and the decisions applicable thereto. Cf. *Santa Cruz Fruit Packing Co. vs. National Labor Relations Board*, 303 U.S. 453, 58 S. Ct. 656, 82 L.Ed. 954. If so, the judgment must be affirmed.—"

"The Sherman Anti-Trust Act, 15 U.S.C.A. Sections 1, 7, 15 note, derives its authority from the power of Congress to regulate commerce among the states. *Blumenstock Brothers Advertising Agency vs. Curtis Publishing Co.*, 252 U.S. 436; 40 S. Ct. 385; 64 L.Ed. 649. Assuming that transactions constituting intrastate commerce may come within the provisions of the Sherman Act (*Local 167 vs. United States*, 291 U.S. 293, 297; 54 S. Ct. 396; 78 L.Ed 804), *it still is necessary that appellee prove that the dealings of appellants, which form the subject matter of the complaint, operate substantially and directly to restrain and burden interstate commerce.* Cf. *Santa Cruz Fruit Packing Co. vs. National Labor Relations Board*, supra." 108 F(2) at 899-900.

Such has been the consistent holding of this Court and other Courts in both civil and criminal actions under both the Robinson-Patman Amendment and the Sherman Act, and, as we have demonstrated, the full constitutional

power does not reach a local activity having no substantial effect upon interstate commerce. *Wickard v. Filburn*, 317 U.S. 111; 63 S. Ct. 82; 87 L.Ed. 122; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; 62 S. Ct. 523; 86 L.Ed. 726; *Maltz v. Sax* 134 F(2) 236, Cert. Den. 336 U.S. 950; 63 S. Ct. 876; 87 L.Ed. 1720. Also, *U.S. v. Darby*, 312 U.S. 100; 61 S. Ct. 431; 85 L.Ed. 609, and authorities cited on preceding pages.

Petitioner does not claim (because he cannot) that respondent's sales in Santa Rosa were in commerce or had any effect on it. His argument is that since respondent, some four months after its original price cut, sold a minute part of its bread just across the New Mexico line in Texas and made local sales in Santa Rosa in New Mexico at a less price than those at any other place, he is entitled to recover regardless of all the other essential elements. Such a construction entirely disregards the plain wording of the Statutes and the uniform decisions of this and all other courts.

2. In the absence of sales interstate there could be no discrimination under either of the provisions.

The Clayton Act as amended by the Robinson-Patman Act has been on the books since June 19, 1936, and provides in part as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce,—" 15 U.S.C.A. 13(a)

Section 13a (Title 15 U.S.C.A.) was also approved on June 19, 1936 and provides in part as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce—to sell—"
(15 U.S.C.A. 13a)

Both Sections require that the accused be "in commerce" and "*in the course of such commerce*" commit the forbidden act. The Clayton Act has the added clause "*where either or any of the purchases involved in such discrimination are in commerce*—" which is a requirement that a sale be made in commerce. This in itself utterly defeats petitioner's action during the first 3 months and 24 days of the price cut because no sales of any character were being made by respondent outside New Mexico during that time.

With respect to the words "*either directly or indirectly*" following the words "*in the course of such commerce*" in the Clayton Act, we submit that the authors of the Act were cognizant of the then current decisions of this Court in drawing a distinction between activities directly affecting interstate commerce and indirect effects which was then isolated. (For example—*A. L. A. Schechter Poultry Corporation v. U. S.*, 295 U.S. 495; 55 S. Ct. 837; 79 L.Ed. 1570.) This may be interpreted as an expression of an intent on the part of Congress to include activities having an effect on interstate commerce, but of course, it could not be extended beyond the constitutional powers. However, it is most clear that Congress did not exercise the fullest of its powers because it required that sales be made in the stream of interstate commerce, and this Court so found in the case of *Standard Oil Co. vs. F. T. C.*, 340 U. S. 231; 71 S. Ct. 240; 95 L.Ed. 239, where it stated:

"In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman

Act, they must have been made in interstate commerce." 349 U.S. at page 237.

Section 13a expressly requires that the accused be not only engaged in interstate commerce but that the forbidden act be committed "in the course of such commerce." No attempt is made in the latter act to reach an intra-state activity. This Court had a similar act before it in *F. T. C. v. Bunte Bros., Inc.*, 312 U.S. 349; 61 S. Ct. 583; 85 L.Ed. 881, involving the construction of Section 43a of Title 15 U.S.C.A. (64 Stat. 21) which declared "unfair methods of competition" "in commerce" unlawful and vested the Commission with enforcement powers. In construing the phrase "in commerce" this Court said:

"This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce' requires, in view of all the relevant considerations, much clearer manifestation of intent than Congress has furnished." 312 U.S. at 355.

"When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." 312 U.S. at 351.

"The construction of Section 5, (15 U.S.C.A. 45) urged by the commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. Such control bears no resemblance to the strictly confined authority growing out of railroad rate discriminations. An inroad upon local conditions and local standards of such far reaching import as is involved here, ought to await a clearer mandate from Congress." 312 U.S. at page 355.

While it is true that the Act involved in the Bunte Bros. case is a different Section, there is no practical difference in the wording. If any exists it would favor the respondent because the words of Section 13a plainly require that the sale "at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition,—" (15 U. S. C. A. 13a) be made "in the course of (interstate) commerce." The act could not apply to this case under any circumstances because the price was not reduced on goods moving across a state line.

It should be further noted that in the Bunte Bros. case this Court had before it an enactment which had been law of the land for a quarter of a century and during that time no effort had been made by the Commission to apply the Act to activities having only an effect upon interstate commerce and upon this point stated:

"But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was conferred." 312 U. S. at page 352.

The Clayton Act has been on the books since October 15, 1914, and as amended by the Robinson-Patman Act since June 19, 1936. Section 13a (Title 15 U. S. C. A.) has also been on the books since June 19, 1936. During all these years no attempt has been made to apply the Sections in a manner as contended for by petitioner. His position is novel in that he seeks to apply the Acts without regard to the absence of interstate sales during the first 3 months and 24 days of the price cut and without regard to the absence of any connection between the complained of sales in Santa Rosa and interstate commerce or affectation thereon during the latter portion of the period of the price cut.

Both of the Sections require that they be sales in interstate commerce, so, obviously the provisions could not apply to the first three months and 24 days of the price cut, which brings us to the consideration of the period of the price cut during which a few sales were made in Farwell, Texas.

3. The sales in Santa Rosa and the belated sales in Farwell, Texas, were not so related or connected that one could affect the other.

The provisions of the Sections themselves, as well as the authorities reject any theory that Congress has exercised the fullest of its powers, and it is quite clear that Section 13a could not under any circumstances apply because sales were not made in interstate commerce at a lower price than exacted elsewhere. The Robinson-Patman Act must be kept within constitutional limits and could reach only those intrastate activities which are shown to affect the flow of goods moving interstate in some substantial way. The Court of Appeals correctly applied the law to the facts of this case, and, though we do not want to be laborious, an examination of the facts will establish that the price cut was wholly local and did not have or threaten an adverse effect on interstate commerce.

From the time respondent started trucking its bakery products from its only bakery in Clovis, New Mexico, to Santa Rosa, New Mexico, on an unknown date in January of 1948 (R. 48, 47, 74), until after the boycott and price cut had been in effect 3 months and 24 days, the respondent's business was wholly local. No sales were made on the Texas side of the State line until December 27, 1948, (R. 131) following the date (September 3, 1948) of the boycott and

date of the price cut. R. 90. On December 27, 1948, and not until that date were sales of any character made in interstate commerce. At no time did the products sold in Santa Rosa by respondent pass across a state line. R. 48.

Mr. Moore tells us that when Mead's came to Santa Rosa in January of 1948 (R. 47) it solicited the stores, conducted themselves properly and took no unfair advantage of him. R. 75, 82, 89. He tells us that this practice enabled Mead's to place their products in "all the grocery stores" in "I think about two months." R. 76. No change took place in the competitive relationship until the morning of September 3, 1948, at which time the merchants of Santa Rosa by pre-arranged plan denied respondent the right to do business in that town by refusal to purchase their bakery products. R. 90.

When petitioner first saw evidence of respondent's presence in the town, he concluded—"I knew there wasn't enough business here for them and me both and when I drove by and saw my rack sitting on the sidewalk, (the respondent had installed a new rack, R. 81), I decided right then the quickest way out of town would be the best plan for me. It was the day I started planning to move to Tucumcari, and they gradually, I don't know how long it took them, I think about two months, to get into all the grocery stores." R. 75, 76. He leased a building in Tucumcari in June (R. 76) and a month before he planned to move he informed his landlord in Santa Rosa of his action. R. 76. The landlord, together with others, asked petitioner what it would take to keep him in Santa Rosa, and he replied that he didn't know of any thing that they could do to keep him there; but when they offered him all the business in the town, he decided to stay if the merchants "would support me one hundred per cent." R. 77. A petition was prepared and circulated and he tells us that "all

except one store signed the petition one hundred per cent." R. 76, 77. There was no doubt as to the intent of the petition or his meaning when he stated that he would stay in Santa Rosa if they "would support me one hundred per cent" because Mr. Moore says that "they had to quit buying Mead's bread" (R. 79) "just his bread" (R. 79), "wasn't supposed to buy any out-of-town bread" (R. 79, 87), so he "would not have any competition" and "would have a monopoly." R. 80.

He tells us that after the petition was signed by the merchants a meeting was held in a "little back room" to "decide on what day this petition would be effective, get them all together so that it would all be effective the same day." R. 86.

While the slaughter was being quietly planned and organized, respondent continued its grazing in a manner with which even Mr. Moore could find no fault. R. 75. Then at the prearranged time, the morning of September 3, 1948, (R. 90) the boycott struck and respondent's market in Santa Rosa was closed to it.

Mr. Corcorran, Vice-president of respondent, testified that he went to Santa Rosa the day the boycott struck and found that the merchants were refusing all Mead's products. R. 170. He tried to talk the merchants out of the boycott, but they all refused. R. 171. Confronted with this, he reduced the wholesale price of white bread in Santa Rosa to 7 cents per pound. R. 171, 172. There can be no doubt as to the cause of the price cut because Mr. Moore tells us very plainly—"and when I told him (his Santa Rosa landlord) about leaving, well, he got up in the air and told some others and none of them wanted me to leave, and that is what started this petition, and that is what started the price cutting." R. 76. Mr. Moore further confirms the fact that the price was cut on bread only (R. 70) and only in the

town of Santa Rosa. R. 48, 97. He also confirms that no price cut took place on any other bakery products (R. 69), and testified that he lost no sales on bread outside the town of Santa Rosa (R. 49) and lost no sales on other items in or outside of Santa Rosa. R. 69.

Mr. Moore tells us that he was in competition with respondent in other towns and communities in the area, but no change in price took place there. R. 48. The price cut was confined to the small town of Santa Rosa.

Mead's recovered a part of their former customers; but when the price was returned to 14 cents on April 26, 1949 (R. 48), as well as at the time petitioner decided to close his shop on February 28, 1950, (R. 49), Mr. Moore tells us that he still held five stores exclusively which included the "biggest ones." R. 63. He further testified that the "boycott was still 'four-tenths' effective at the time he terminated his business." R. 94.

This decision to close his business 10 months after April 26, 1949, was made in the face of a very substantial increase in business. Between February 1, 1947, and January 21, 1949, (the year immediately preceeding Mead's entry in the market) he had gross sales amounting to \$47,742.63. During the last 12 months of his operation he had gross sales of approximately \$70,000.00. R. 113, 114.

Mr. Moore concedes and takes the position that the boycott and price cut was a fight between the merchants and Mead's and that he was not involved at all—

Q. "As I understand your position here, this is a fight between Mead's and the merchants. Is that right?

A. That is my position. Q. You weren't involved in it at all? A. No. Q. The merchants against Mead's, is that right? A. That is my position." R. 213.

Further, he says he could have stepped the boycott by requesting the merchants to do so, (R. 97) but he made no such request. R. 211, 212.

The very most that can be said of the facts of this case is that it reflects nothing more than a town squabble that never at anytime reached beyond the City limits.

The petitioner's operation was wholly intrastate, and such fact is conceded by him at pages 28-29 and 31 of his brief. The only commerce involved was the few sales of the respondent made beginning on December 27, 1948, (R. 131) on the Texas side of Texico-Farwell situated on the line between Texas and New Mexico. The respondent's Secretary-Treasurer testified that between the 27th day of December, 1948, and the day the price of bread was increased, its total sales on the Texas side were \$2,302.39, that the overall sales of respondent during the period of the price cut were \$135,129.00; and that on a percentage basis the sales in Farwell were 1.7 per cent of the total sales (216-217).

The sales in Santa Rosa and the belated sales in Farwell were two separate and distinct transactions. The sales in New Mexico were not conditioned or dependent in any manner upon the sales in Farwell, and the sales in Farwell were not dependent or conditioned in any manner upon the sales in New Mexico. No relationship is shown to have existed between respondent's customers in Santa Rosa and its customers in Farwell. They were merely retail grocers selling to local consumers. No sales were made in New Mexico or Texas to customers who in turn resold in interstate commerce.

The goods sold in Santa Rosa were trucked by respondent from its plant in Clovis, New Mexico, without passing across state lines, and it does not appear that any of the bakery items sold in New Mexico ever crossed a state line. There is no evidence of any alteration of prices in Farwell, nor does it appear that the sales in Santa Rosa 100 miles

West either brought about or threatened to bring about any disruption or injury to competition in Farwell as between bakers or retailers. Certainly the sales in Farwell had nothing whatsoever to do with bringing about the boycott-price cut, for such sales did not begin until several months after the boycott-price cut had begun; and it does not appear that such sales in any way contributed to the Santa Rosa trouble. No advantage appears to have been gained by respondent in Farwell by reason of the Santa Rosa sales and no gain flowed to respondent in Santa Rosa by reason of the Farwell sales.

The petitioner concedes that his business is wholly intrastate (petitioner's Brief at pages 29 and 31). He mentions cakes purchased by him from California but a casual reading of petitioner's Record references (pages 68 and 122) quickly reveals that the witness was being examined about his business during the year 1947 which was the year preceding the time of Mead's entering Santa Rosa. It does not appear in the Record that petitioner ever bought a penny's worth of materials, supplies or equipment outside of the State of New Mexico or sold anything outside that State after Mead's entered the market in January of 1948 and in particular, during the period of the price cut. Further, it does not appear in this Record that he purchased any item that had been shipped into the State¹ or that he sold to anyone who resold in interstate commerce after Mead's started doing business in Santa Rosa or during the period of the price cut.

If petitioner was doing an interstate business of any character he should have come forward and made positive proof of its existence during the period of the price cut and given

¹ If such proof did appear he must "—prove that the dealings of appellants, . . . operate substantially and directly to restrain and burden interstate commerce." *Ewing-Von Allmen Dairy Co. vs. C. & C. Ice Cream Co.*, 109 F(2) 898, Cert. Den. 312 U. S. 689; 61 S. Ct. 618, 85 L.Ed. 1126.

some expression of its character, quantity and frequency. If Mr. Moore was adversely affected as a result of the price cut, the effect spent itself solely upon an intrastate activity and did not burden interstate commerce.

The aims were of a wholly local nature and this is not denied or disputed by the petitioner either in his testimony or in his brief. He takes the position that it was a "fight between Mead's and the merchants" in Santa Rosa (R. 13), brought about by the boycott (R. 76) and in his brief he seeks to overcome the local aim by an enlargement of the facts when he reasons that "If they can pick off and eliminate local competitors, as they did petitioner, monopoly and the destruction of competition will be the result." Petitioner's Brief p. 34. The problem is that the Record does not reflect that respondent has ever been guilty of "picking off" a competitor either in Santa Rosa or elsewhere. There is no evidence that it has ever been involved in a price cutting or other similar activity before or since this situation. The aims of respondent, consciously and unconsciously, did not extend beyond the town of Santa Rosa or for that matter beyond the recovery of the very market there taken from them. The reason for the ruling in *U. S. v. Frankfort Distilleries, Inc.* (*supra*) does not exist, nor does *The Shreveport* case (*Houston, E. & W. T. R. Co. v. U. S.*, 234 U. S. 342; 34 S. Ct. 833; 58 L. Ed. 1341) apply, because the New Mexico and Texas sales were not so related or connected that one could in any way affect the other.

4. The price cut in Santa Rosa was wholly local and neither adversely affected nor threatened adverse effect upon interstate commerce.

The basic evils to interstate commerce sought to be prohibited by the sections upon which petitioner predicates his contention are not present in this case. Though the evidence utterly fails to bear him out, petitioner charges that he was eliminated as a competitor; and argues that if this be true, respondent must necessarily be convicted as a monopolist. In the light of this contention the facts must be examined to first determine its correctness and if correct then determine whether or not there was a resulting effect upon interstate commerce, which we shall certainly do in succeeding pages.

Antitrust violations are identifiable by resulting evils to commerce or to the public, such as: the power to restrict trade or fix prices. It is evidenced by a deterioration in the quality of goods or curtailment of production. When applied to the Federal acts in question such powers or burden must reflect themselves adversely upon goods moving interstate.

There is no evidence that respondent held the power to dictate the price of bread in Santa Rosa or any other place. It reduced the price of its bread, but no circumstances were shown which gave the slightest hint of the power to fix the price of any bread other than its own. The identical situation occurred in Tucumcari long after the troubled waters had been calmed in Santa Rosa when Mr. Moore cut the price of bread on Mead's (R. 214). Whatever power respondent possessed, Mr. Moore also possessed, and neither extended beyond the power that any ordinary merchant has to set the price of his own products. The power was balanced, which is not inconsistent with today's concept of competition. But assuming that Mead's had or acquired the power to fix prices, no circumstances appear which would justify a conclusion that it could extend beyond the town of Santa Rosa. However, respondent has not been convicted of acquiring a position of dominance in any

market. It was doing nothing more than fighting for its economic life in the single town of Santa Rosa.

There is no evidence of a deterioration of quality, and the facts themselves negate a curtailment of an interstate product on the grocery shelves in Santa Rosa. This is true even with respect to the petitioner's goods. His goods were never at any time removed from any bread rack in Santa Rosa. However, the respondent's goods were excluded at all times in either all or a substantial portion of the stores in Santa Rosa. Mead's never saw the light of day when Mr. Moore's goods were not sitting along side of its products, though Mr. Moore enjoyed the business of five of the stores without competition; (R. 93), and the day Mr. Moore closed his bakery, Superior Baking Company took his place (R. 175).

Disregarding the boycott and other evidence establishing the singular objective of regaining a lost market, had Mead's succeeded in obtaining a monopoly in Santa Rosa, it would have held no position of coercion over interstate goods; for it is not shown that such goods over which Mead's could exert such power were present in the market. It may be that the Robinson-Patman Act was designed to catch an evil in the "seed"; however, it was not designed to kill the flower that may or may not produce the "seed" of evil. Even a glint of the eye would not be sufficient. For the acts of respondent to amount to a possibility of achieving a coercive position with respect to interstate commerce, additional or more extensive, forbidden activity would be necessary.

There was no change in the competitive situation resulting from the price cut which could have had effect upon interstate commerce. The competition of the petitioner, if it existed, was not in commerce, and, if eliminated, would have had only a local effect. Nevertheless, there has been no determination by the jury or other judicial agency that

the price cut had anything to do with the closing of his business nearly a year after the price was raised. In fact the petitioner himself does not support the contention. In response to the question "and when Mead's came in there selling bread and offering bread at the same price you were offering it, your business was not profitable?", he answered, "That's right." (R. 213).

Again at page 212 of the Record:

Q. "You knew in January after Mead's got there your business wouldn't be profitable with Mead's in town on a fair basis? A. Well, the size of the town wasn't large enough for anyone to run in. Q. But your business would not be profitable with Mead's in town on a fair basis, would it? A. Well, I wouldn't confine it to Mead's. Q. Well, Mead's or anybody else in town on a fair basis? A. That wouldn't be considered fair basis when you consider the size of their operation and mine."

Earlier in his testimony he was quite explicit on the matter of his position in the market prior to the boycott-price cut:

Q. "You just couldn't make it there with Mead's in the market with you? A. That's right. Q. It was impossible for you exist? A. That's right. Q. So there was only two alternatives, to *either close down or move out*; is that right? A. That's right. Q. You reached that conclusion back in January, 1948; right? A. That's right. Q. And this price cutting didn't take place or the boycott didn't take place until September of 1948? A. That's right. Q. Some eight months later. A. That's right." (R. 82.)

Again at page 89 of the Record:

Q. "All right, this was an organization of your friends, wasn't it? A. Yes, sir. Q. And you needed all of that Santa Rosa business to exist? A. Yes, sir. Q. And you had nothing against Mead's? A. No. Q.

They had conducted themselves properly; is that right?
A. Yes."

Mr. Moore's determination (1) that his business was not profitable and (2) that he "could not exist" in a fair market and (3) was compelled to close down or move out, remained unchanged because in June of 1948 he leased a building in Tucumcari, New Mexico (R. 76) and "about a month before he planned to move" he went to tell his landlord in Santa Rosa of his intended move (R. 76).

He again makes his position in the market clear after the boycott started and the price had been cut:

Q. "You wanted then to go on with the boycott?
A. Well, I wanted the business because I knew I had to have it to exist. Q. You kept hoping that the boycott would succeed? A. *It had to succeed before I could exist.* Q. You kept hoping that the boycott would succeed? A. Well, it had to." (R. 84.)

Further, the fact that he could have stopped the boycott but made no attempt to do so would (R. 97, 211) evidence the finality of his conclusion.

The evaluation of his "close down or move out" position in the market prior to the boycott would certainly establish his agreement that fair and equal competition was the moving factor which brought about his decision to close his business 10 months after the price of bread was raised. This, when coupled with the fact that the boycott was still 4/10ths effective (R. 94) and that he was doing 50 per cent more business than he was doing the year preceding any actual competition (R. 113, 114) becomes a compelling conclusion. Further he testified that his total loss as a result of the price cut was \$299.00 (R. 103). Whether this loss or his loss resulting from his price cut in Tucumcari long after the Santa Rosa incident (R. 214) was the moving factor resulting in the closing of his shop remains an open ques-

tion. In view of the \$299.00 profit loss in Santa Rosa it appears that his action in Tucumcari could have at least equally contributed to the closing. However, the more reasonable conclusion would be that he *decided* to close down because he had to compete in a fair market. We use the word "decided" because it was optional. He testified that at the time he closed his bakery it was solvent (R. 49), and the "decision" was made the day competition arrived in Santa Rosa (R. 76), and that decision remained unchanged as shown by the above testimony.

If an unnatural change did take place when petitioner decided to close his business, it was brought about by a decision on his part or as a result of events other than the price cut in Santa Rosa. The most that can be said is that if it contributed to the closing at all, its contribution was remote and inconsequential. This fact alone would defeat his action because the act is not designed to reach remote and inconsequential effects upon competition, *Signode Steel Strapping Co. v. F. T. C.*, 132 F(2) 48, or acts having the mere possibility of lessening competition. *Corn Products Refining Company v. F. T. C.*, 324 U. S. 726, at page 738; 65 S. Ct. 961 at page 967; 89 L. Ed. 1320; *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F(2) 1, Cert. Den.; 338 U. S. 948; 70 S. Ct. 486; 94 L. Ed. 584; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346; 42 S. Ct. 360; 66 L. Ed. 653. In any event such effect that the respondent's price cut may have had was confined to the petitioner alone and to the area of his operation, if not to the town of Santa Rosa alone, with no resulting effect on interstate commerce.

Respondent submits that the evils of monopoly and restraint are not present in this case; and if by mental process the circumstances favorable to the respondent be disregarded, the acts complained of in no way adversely affected or threatened an adverse effect on interstate commerce.

5. *The Porto Rican American Tobacco Co. v. American Tobacco Co.* and *Corn Products Refining Co. v. F. T. C.* cases do not support the position of petitioner.

The Court of Appeals' decision in this case is consistent with *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F(2) 234, Cert. Den., 279 U. S. 858; 49 S. Ct. 353; 73 L. Ed. 997; *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726; 65 S. Ct. 961; 89 L. Ed. 1320; and other authorities relied on by petitioner. In the *Tobacco Company* case American shipped its cigarettes from the United States, where they were manufactured, to Porto Rico where the discrimination took place. In that case commerce between the United States and Porto Rico was used or utilized in carrying out the forbidden practice, which certainly distinguishes it from the case at hand. There the commerce used to injure competition could be constitutionally regulated. Further distinction is found in the fact that both "legs", as petitioner phrases it, were in a commerce which fell within the Congressional power. The makers of Lucky Strikes made no contention that their commerce within the United States was confined to a single state. Such is not the case here. The only commerce subject to regulation in this case is the few unrelated sales made in Farwell.

In the *Corn Products* case the Court discarded again the artificial separation of production and manufacturing from interstate commerce and applied the affectuation principal and found that the local activity did adversely affect such commerce.

"But the effect upon the commerce is amply shown by the interstate and national character of the Curtis Company's business; by petitioner's advertising for Curtis, which was itself frequently in interstate com-

merce, amounting to \$750,000.00; and by Curtis' own admission that it competed in the sale of its candy in interstate commerce, with all manufacturers of one cent and five cent bars of candy. Moreover, some of petitioners' sales to other companies, to whom these allowances were not accorded were made in interstate commerce——" 324 U. S. at page 745, 65 S. Ct. at page 970.

It appears that the discriminatory advertising was given to Curtis Candy Company who was in commerce and denied to other customers who competed with Curtis in interstate commerce. Here again we have the adverse effect flowing across state lines by the conferring of a forbidden advantage to a preferred customer who competed in interstate with other *Corn Products Refining Co.* customers. Further, the discriminatory act itself, advertising, was in interstate commerce. Petitioner, in quoting only the last sentence of the above quotation at page 25 of his Brief, mislead himself into overlooking factual matter appearing in the immediately preceding sentence which gives his quotation an entirely different meaning. The distinction between the *Corn Products* case and our case lies in the obvious fact that here again the forbidden act itself (the advertising) passed across state lines and was conferred upon Curtis who in the course of its interstate commerce received the benefit to the detriment of its competitors who were also in interstate commerce.

Petitioner cites *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 68 S. Ct. 822; 92 L. Ed. 1196, but in that case the very sales complained of were in interstate commerce. He also cites upon *Mantleville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 68 S. Ct. 996; 92 L. Ed. 1328 as best illustrating "the anachronistic decision of the Court of Appeals." In that case the defendants were three refineries in California, and the plaintiffs were all beet

growers in the same state. The defendants entered into an agreement fixing the price to be paid by each refinery for sugar beets, which resulted in a reduction in the price the growers received, and they sued for treble damages. The complaint was dismissed by the trial court on the theory that the transaction was entirely within the State of California. The Ninth Circuit affirmed. It may be said that there was a stipulation in the Record which both courts interpreted as an agreement by the plaintiff that the price fixed for sugar beets had no effect on commerce. This Court, not so interpreting the stipulation, reversed, on finding that all or nearly all of the sugar refined from the beets was shipped in interstate commerce, and that the price paid for sugar beets had a direct and substantial effect on the price of sugar which was an article moving in interstate commerce. The court did not determine that the raising of beets in California was interstate commerce, it merely held that the arrangement between the refineries substantially affected such commerce and came within the provisions of the Anti-trust laws.

The same distinction can be found in every case cited by petitioner, and he makes no claim whatsoever that the sales in Santa Rosa in any way affected interstate commerce and the evidence forecloses such a contention.

We submit that the complained of sales in Santa Rosa did not affect interstate commerce in any substantial manner, and that the Circuit Court correctly reversed the Trial Court's Judgment and ordered the dismissal of petitioner's complaint.

II

THE COURTS WILL NOT DISREGARD THE SEPARATENESS OF DISTINCT CORPORATIONS FOR THE REASON THAT THE STOCKHOLDERS OF RESPONDENT CORPORATION ALSO OWN STOCK IN TEXAS CORPORATIONS ENGAGED IN SIMILAR BUSINESS IN TEXAS UNLESS IT BE SHOWN THAT THE CORPORATE ENTITIES WERE BEING USED FOR SOME UNLAWFUL PURPOSE CONNECTED WITH PETITIONER'S ACTION.

Though the Record utterly fails to support him, the petitioner argues that respondent is a part of an interstate combine by reason of the fact that the holders of stock in the respondent also own stock in one or more corporations engaged in a similar business in Texas, though there is no showing that the ownership is similar either in the individuals owning the stock or the amount owned by each. Petitioner does not make clear his intended application of such an argument.

He makes no contention that the sales in Santa Rosa in any way affected the operation of the separate corporation or corporations doing business in Texas, nor does he argue that there is any relation between the sales at Santa Rosa and the Texas operation. He makes no showing, nor does he argue, that the corporations hold any position of dominance in any market, or that they have ever at any time contravened any law or become involved in any activity even suggesting a violation of any State or Federal Anti-trust law. He merely sees evil in a person owning stock in two corporations doing a similar business.

He does not argue that the Texas corporations were doing an interstate business, because he cannot, nor does he even suggest that any gain resulted to them. He does not contend that the respondent was an instrumentality of any other corporation, nor does he suggest that any other corporation was the agent or instrumentality of the respondent. The whole proof established facts totally unrelated to petitioner's complaint.

The evidence offered shows that the respondent is a New Mexico Corporation with a capital of \$20,000.00. The stockholders at the time in question were Mack Mead, Bill Mead, E. E. Corcorran and W. L. Mead. The book value of respondent on May 27, 1949, was \$59,965.10 (R. 130, 132).

Mead's Service Company was a corporation authorized to do business under the laws of the State of New Mexico with a capital of \$20,000.00. Billy Mead is President, Ed Corcorran, Vice-President, Mack Mead, Secretary-Treasurer. The stockholders and directors are those just named plus Alex K. Miller (R. 129, 130). This corporation was engaged in the business of training bakers and salesmen (R. 125, 130). Mead's Service Company was dismissed from this action by the court at the close of the evidence *on motion of the petitioner* (R. 222).

Mead's Fine Bread Company of Chavis County stockholders are Alex K. Miller, W. L. Mead, Bill Mead and Mack Mead, and E. E. Corcorran. Capital \$17,000.00 (R. 133).

The witness, Mack Mead, testified that his father, W. L. Mead, had owned for several years a bakery in Big Spring, Texas. He further testified that W. L. Mead owns stock in Mead's Fine Bread Company of Lubbock, Texas, and an interest in a Hobbs Corporation, in July of 1949, which was dissolved and its property acquired by Mead's Fine Bread Company of Lubbock, Texas, in 1952 (R. 135). All of which occurred after the time in question in this case. Billy Mead was a stockholder and officer in Mead's Fine Bread Company of Lubbock and was a stockholder in Mead's Fine Bread Company of Big Spring (R. 125). The witness, Mack Mead, Secretary of the respondent, testified that the Corporations were *not* operated as one business (R. 138), and that all checks written by the respondent were signed by its bookkeeper and plant manager (R. 136). He stated that the officers of the respondent lived in Lubbock, Texas, and made

frequent trips to Clovis in carrying out their duties (R. 142). Mack Mead further testified that he recalled two emergency occasions when bread was hauled from Lubbock to Clovis for a day or day and one half when there was a plant breakdown or shutdown (R. 142). Just when such breakdown or shutdown occurred was not shown. The ownership in the Texas Corporations does not appear to be identical with that of the respondent either with respect to persons or percentage of ownership.

The witness, Mack Mead, further testified that there were a number of other bakeries in New Mexico, Texas and Oklahoma, using the name "Mead" in some undisclosed manner, which were owned by a cousin and an uncle of the witness. None of the stockholders of respondent own interest in any of such other bakeries (R. 133, 134).

Petitioner introduced the deposition of Rex Webster, a member of a firm engaged in the advertising business in Lubbock, Texas, who handled a substantial portion of the advertising used by the separate corporations. (See totals of billing to each of the separate corporations over a period of three years.) (R. 249-51.) The witness listed a number of other clients his firm represented (R. 152). He said his firm handled and placed all advertising through the direction of the officers of the separate corporations and that radio, newspaper, billboards, circulars, motion pictures and point of display mediums were used (R. 146). He testified that the different corporations sold bread labeled Mead's Fine Bread, that advertising programs varied with each separate corporation when tied to some event, and that part of the advertising was substantially the same (R. 151-2). He stated that he was paid by the individual corporations (R. 152). The respondent introduced samples of advertising (R. 253-259) and two instruments identified as a joint order for flour from Harvest Queen Mill & Elevator Company (R. 169, R. 279).

Courts will look behind a multi-corporate set up only if there is evidence of a purpose to evade a statute or to practice a fraud upon third persons. *Esmond Mills v. Commissioner of Internal Revenue*, 15 F(2) 753, at page 755; Cert. Den.; 319 U. S. 770; 63 S. Ct. 1432; 87 L. Ed. 1718; *E. Albrecht & Son v. Landa*, 114 F(2) 202; *Stone v. Eacke*, 127 F(2) 284, Cert. Den.; 317 U. S. 635; 63 S. Ct. 54; 87 L. Ed. 512.

There is nothing immoral or illegal for a person or persons to hold stock in as many corporations as he likes even though they are engaged in a similar business. The same is true of a man sitting on more than one Corporate Board of Directors or holding office in more than one corporation. The petitioner presented one or two isolated instances of a common undertaking on the part of two or more of the corporations, none of which are connected in any manner with petitioner's complaint.

If there are advantages in using the common family name as a corporate and product name, the law does not condemn the practice unless it be shown that someone was misled to his detriment. A pooling of purchasing power is neither evil nor unlawful, unless it is shown to have been used for some unlawful purpose. It is dictated by good business practices and no evil design appears.

The use of a common name has its business advantages. That is why the name "Ford" or "Chevrolet" is a part of the business name of nearly every Ford and Chevrolet dealer in the country. When a name is attached to a good product for a long time, the name becomes synonymous with the product. Good business practices would again dictate the use of the family name as a name for its products. Nothing fraudulent or cynical can be found in that.

The material or supplies purchased on a common order does not evidence a disregard of the corporate entity. The proof must go further and show a commingling of the ma-

terials or supplies purchased. Here the purchase order shows the price each corporation must pay and payment is due "as bid" (R. 279, 283).

The subject is discussed in *Owl Fumigating Corporation v. California Cyanide Company, Inc.*, 30 F(2) 812. In that case the court stated that identity of corporate names, the relation of principal and agent, identity of officers or the loan of money by one to the other, even in large amounts, does not disturb or bring together distinct corporate entities. The Court further stated at page 812 that:

"When as against the general rule that two separately incorporated companies are separate and distinct entities, it is charged that one is a mere agency or department of the other and is used as an instrumentality to perpetrate fraud, justify wrong, avoid litigation or render it more difficult, or generally to escape liability for what are in substance its own acts, courts will put aside the screen—and place responsibility where it belongs."

On this subject see also *Nichols & Co. v. Secretary of Agriculture*, 131 F(2) 651; *State v. Swift & Co.*, 187 S. W. (2) 127 at page 133. (Error refused.)

The evidence on this issue was not sufficient to apply the rule of agency or instrumentality to the respondent. There is not the slightest hint of evidence that one corporation was using the other for any purpose whatsoever, and in particular, for any purpose in connection with the complaint in this case. There is no evidence of a commingling of property, money or business. On the contrary each paid its own way and conducted its own business. The respondent is not shown to be a dummy. It is an entity with a governing board and officers, it has its capital and is engaged in business in Clovis, New Mexico. It was charged and cited, it answered and has been tried and convicted by the trial court of a crime it is alleged to have committed. The

petitioner does not seek a recovery against the Texas Corporations and has made no charge against them. He only argues that they exist but makes no showing of any relation or connection between the Santa Rosa sales and the activities of the Texas Corporations nor does he show that one was dependent upon the other.

The evidence in this case is wholly insufficient to support a finding that the separate corporations were all a single enterprise forming an interstate combine that would justify treating the sales of any other corporation as the sales of the respondent.

It is submitted that the Court of Appeals disposition of this cause is correct and should be affirmed.

III

THE DOCTRINE OF "THE LAW OF THE CASE" IS NOT APPLICABLE TO QUESTIONS NOT DETERMINED IN A PRIOR LEGAL DECISION NOR IS THE DOCTRINE A LIMITATION UPON THE POWER OF THE COURT TO RECONSIDER SUCH PRIOR DECISION.

The contention of the petitioner that the Court of Appeals has heretofore disposed of this case cannot stand for three reasons:

(1) The question involved, if it has been previously determined, was decided against the petitioner by the lower Court in its first opinion, (see below) wherein the Court expressed extreme doubt that the situation here presented was wholly local having no impact on interstate commerce.

(2) the doctrine of "the law of the case" is not a limitation upon the power of a court to reconsider prior decisions; and,

(3) we know of no case where an upper court has denied the power of a lower court to reconsider its previous determinations.

The Court of Appeals in its first opinion (184 F(2) 238 at page 340) stated:

"It is extremely doubtful whether the discriminations complained of come within the provisions of the Robinson Patman Act. * * * The only interstate features were that the defendants made some sales in Texas which were unaffected by the discriminations. It seems clear that we have nothing more than a local price cutting never having any affect or impact upon interstate commerce and placing no burden upon the same."

In its second opinion, reported in 190 F(2) 540, the Court did not go back into the effect of the Santa Rosa sales on interstate commerce; and in its last opinion said:

"But in leaving the case to the undetermined facts, we did not thereby intend to hold or imply that the mere fact of interstate commerce and local price discrimination, standing alone, made out a prima facie case for the plaintiff. Indeed, on first consideration, doubt was expressed whether the purely local price-cutting war had any actionable effect or impact upon interstate commerce." 208 F(2) 777 at 778.

The Court of Appeals makes it quite clear that it did not intend, by the reversal of the case in the second opinion, to foreclose the question of whether or not the sales in Santa Rosa affected interstate commerce. If it had, we know of no rule denying the court the power to reconsider its previous decision. The doctrine of "the law of the case" expresses only the "disinclination on the part of an appellate court to re-examine its own prior legal pronouncements in the case, but the doctrine does not destroy its power to do so. *Commercial Nat'l Bank in Shreveport v. Connolly*, Fifth Cir., 176 F(2) 1004. To same effect: *State of Kansas v. Occidental Life Ins. Co.*, Tenth Cir.,

95 F(2) 935, cert. den., 305 U. S. 603; 59 S. Ct. 63; 83 L. Ed. 383; *General Motors Acceptance Corporation v. Mid-West Chevrolet Co.*, Tenth Cir., 74 F(2) 386.

The Supreme Court in *Russell E. Messenger v. Peter Anderson*, 225 U. S. 436; 32 S. Ct. 732; 56 L. Ed. 1152, says that the doctrine—

“ merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. (Citing authorities) of course, this court, at least, is free when the case comes here.”

The Court of Appeals was of the opinion that it left open the question decided by it, and we know of no one in a better position to interpret its opinions.

Further, the earlier denial of certiorari is not equivalent to an affirmance of the earlier opinion of the Court of Appeals, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251 at 257-258; 36 S. Ct. 268; 60 L. Ed. 629; but in any event the granting of this Writ opens the entire record even though the Court of Appeals may or may not have considered a matter on a previous appeal, because a previous denial is not an expression upon the merits of a case, *Brown v. Allen*, 344 U. S. 443 at 456; 73 S. Ct. 397; 97 L. Ed. 469; *Hause v. Mayo*, 324 U. S. 42 at 48; 65 S. Ct. 517; 89 L. Ed. 739.

The lower Court contravened no law in its last disposal of the case, and its decision is correct and should be affirmed.

IV

THE EVIDENCE IN THIS CASE ESTABLISHES THAT THE PRICE CUT DID NOT HAVE AND COULD NOT HAVE HAD THE EFFECT OF SUBSTANTIALLY LESSENING, INJURING OR DESTROYING COMPETITION.

There are other reasons why the Court of Appeals' decision should stand. Sections 13(a) and 13a (Title 15

U. S. C. A.) makes unlawful a discrimination provided certain indispensable elements are present.

In Section 13(a) it must appear that:

"* * * the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce,—"

and in Section 13a the objective of the discrimination must be one—

"of destroying competition, or eliminating a competitor * * *"

The subject matter of the Sections is "competition." It seeks to preserve nothing but competition—not property or property rights. The public has no interest in a competitor's property. Its interest is limited to the continuance of open competition, and the law seeks to protect the public by preserving competition. For the petitioner to recover, therefore, it must be made to appear that "competition" has been or probably would have been lessened or destroyed as a result of a discrimination. *Corn Products Refining Company v. F. T. C.*, 324 U. S. 726; 65 S. Ct. 961; 89 L. Ed. 1320; *Chicago Sugar Company v. American Sugar Refining Company*, 176 F(2) 1, cert. den.; 338 U. S. 948; 70 S. Ct. 486; 94 L. Ed. 584.

It necessarily follows then that in order for a violation of either section to occur it is indispensable that a "competition" exist; and to produce an injury to the petitioner, under such provisions, he must show himself to be a "competitor" to come within their provisions.

The petitioner has repeatedly testified that he could not exist with Mead's in the market on a fair basis (R. 82, 84, 89, 212), and that he had to either close down or move out (R. 82). Having determined his status, he decided to move and rented a building in Tucumcari. About a month

before time; for the move he informed his Santa Rosa landlord (R. 76), and when he told the landlord "about leaving" (we quote Mr. Moore) "he (the landlord) got up in the air and told some others and none of them wanted me to leave, and that is what started the petition,—" (R. 76). The landlord "got some fellows together and they called me up and asked me what it would take to keep me in Santa Rosa and not move my plant, and I told them I didn't know. I didn't know of anything they could do. I didn't think there was anything possible to do to keep me there, and they talked a while and asked me if I would stay if all the merchants in town agreed to patronize me. And after thinking it over two or three days and all the odds and ends of going and everything, I decided if the merchants wanted me to stay that had I would stay if they supported me one hundred per cent. So these fellows got out the petition,—" (R. 77). Mr. Moore makes clear the conditions under which he would remain in Santa Rosa and these conditions found expression in the petition and the subsequent boycott. To him it meant that the merchants were required to "quit buying Mead's bread" (R. 79) or any other "out of town bread" (R. 87), "just buy his bread" (R. 79) so that he "would not have any competition" (R. 80), and "have a monopoly," (R. 80).

Up to this point he conclusively establishes that he did not remain in Santa Rosa to compete. There being no doubt as to the condition upon which Mr. Moore agreed to remain, his attitude relative to the matter of competition in Santa Rosa after the boycott was under way must be examined to determine whether or not he ever changed his mind and decided to compete in an open and equal market. On this he testified as follows:

Q. "You wanted them to go on with the boycott?"

A. Well, I wanted the business because I knew I had

to have it to exist. Q. You kept hoping that the boycott would succeed? A. It had to succeed before I could exist. Q. You kept hoping that the boycott would succeed? A. Well, it had to." (R. 84).

Mr. Moore further says that he could have stopped the boycott at any time (R. 97) but made no effort to do so. (R. 211, 212).

A clearer declaration of a refusal and continuance of a refusal to compete could not be made. **HE ONLY REMAINED NOT TO COMPETE.** The record is utterly barren of any expression of any willingness to remain in Santa Rosa and compete on a fair and equal basis with anyone.

We are not talking about any illegal act on the part of Mr. Moore, for it is assumed that a man has a right to refuse to compete. He says he had nothing to do with the boycott (R. 212, 213), and respondent does not take issue, because the question is not whether Mr. Moore committed any illegal act; but whether the competition created by his business under the continued circumstances of refusal to compete is a competition at all that could be lessened, injured, eliminated or destroyed. Under the circumstances of Mr. Moore's refusal to compete it would have been utterly impossible for the alleged illegal acts to adversely affect the competition in Santa Rosa.

These articles are not designed to prohibit discriminations having the mere possibility of a lessening of competition or the creation of a monopoly. *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726 at page 738; 65 S. Ct. 961 at page 967; 89 L. Ed. 1320, nor is it intended to reach every remote, trivial or sporadic lessening of competition. *Sig-node Steel Strapping Co. v. F. T. C.*, 132 F(2) 48; *Minneapolis-Honeywell Regulator Company v. F. T. C.*, 191 F(2) 786. Any resulting injury to competition in Santa

Rosa flowing from the price cut must have been trivial for he was never at any time willing to compete.

All of this points up the ridiculousness of the situation. The respondent was accused, convicted and fined \$68,400.00 by the trial court for an alleged injury to a "competition" that even the competitor, our accuser, says did not exist. Mr. Moore's claim is a personal grievance that respondent ought not be permitted to compete with him on an equal basis. Personal grievances are not actionable under the antitrust laws. *Shatkin v. General Electric Company*, 171 F(2), 236, cert. den.; 336 U. S. 950; 69 S. Ct. 876; 93 L. Ed. 1105. *First National Pictures v. Robinson*, 72 F(2) 37 at page 40. Cert. den.; 293 U. S. 609; 55 S. Ct. 125; 79 L. Ed. 700.

It is respectfully submitted that "competition" as contemplated by the Sections did not exist and therefore could not have been lessened, injured, destroyed or eliminated, and that the Court of Appeal's disposition of petitioner's action ought to be affirmed.

V

THE PRICE CUT WAS MADE IN RESPONSE TO A CHANGED CONDITION AFFECTING THE MARKET FOR AND MARKETABILITY OF RESPONDENT'S GOODS WITHIN THE MEANING OF THE FOURTH PROVISIO OF SECTION 13(a) AND IS EXCLUDED FROM THE PROVISIONS OF THE ROBINSON-PATMAN ACT.

The fourth proviso contained in Section 13(a) (Title 15 U. S. C. A.) provides as follows:

"And provided further, that nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for, or the marketability of, the goods concerned, such as, but not limited to, actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress

sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (15 U. S. C. A. 13(a))

This proviso reflects a Congressional realization that it was delving into a bottomless pit when it passed the act, and we think that the Court of Appeals committed error when it held in the prior appeal (190 F(2) 540) that the proviso was limited only to the situations listed; and that this Court erred in denying certiorari (342 U. S. 902; 72 S. Ct. 290; 96 L. Ed. 675). It occurs to respondent that to give effect to the proviso, the words "such as" refer to situations similar to the specific examples listed; and the words "but not limited to" are an enlargement. To give the latter words meaning they must refer to instances other than those listed which affect "the market for or the marketability of the goods concerned," otherwise, we give both the same meaning and one would be surplusage.

The respondent urges that the market for and marketability of its goods was destroyed in Santa Rosa on September 3, 1948. The boycott and its purpose was admitted (R. 79, 80, 87). This was a decided change in the market for its products. The continuance of the boycott is admitted by the petitioner and he said the boycott had to continue for him to exist (R. 84.) He further stated that he could have stopped the boycott but made no attempt to do so and concedes that the boycott was still 40 per cent effective when the price was raised (R. 94, 97).

Q. "Is that right? The petition or boycott was still four-tenths, or four out of ten still effective in so far as the boycott and petition were concerned? A. Yes." (R. 94.)

If there had been the slightest hint that Mead's had in any way provoked the merchants action, the matter would be one of fact; but such provocation does not appear. Fur-

ther, any suggestion that Mead's action was excessive in any respect is repelled by the fact that respondent says that the boycott was still 40ths effective and that he held at least 4, if not 5, of the stores exclusively even until the day he closed (R. 93).

We respectfully ask the Court to reconsider this matter and pray that the decision of the Court of Appeals in reversing and directing dismissal of petitioner's action be affirmed.

Conclusion

It is respectfully prayed that the action of the Honorable Court of Appeals in reversing the Trial Court's Judgment and directing dismissal of petitioner's action be affirmed for each of the reasons set forth in that Court's opinion and contained in this brief in support thereof. In the alternative, should it be determined that it violated one of the Sections but not the other, respondent prays that the cause be reversed and remanded for new trial.

PART B

ASSIGNMENTS OF ERROR BROUGHT FORWARD IN SUPPORT OF THE REVERSAL OF THIS CAUSE BY THE COURT OF APPEALS.

Without prejudice to its argument in support of the decision of the Court of Appeals in reversing and directing the dismissal of petitioner's action, the respondent brings forward points of error in support of the reversal of the cause by that Court. Each of the points presented were preserved in the appeal from the trial court's judgment and argued to the Court of Appeals, but were not passed on by that Court.

ASSIGNMENT No. I

IN AN ACTION UNDER SECTION 13 OF THE ROBINSON PATMAN ACT (TITLE 15 U. S. C. A.), THE ACCUSED WAS ENTITLED TO SHOW JUSTIFICATION FOR THE SALE OF ITS BREAD AT A REDUCED PRICE WHERE IT APPEARS THAT SUCH A REDUCTION IN PRICE WAS MADE IN RESPONSE TO A BOYCOTT EXPELLING IT FROM THE MARKET.

Section 13(b) of Title 15 U. S. C. A. provides:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with violation of this section and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination; provided, however, that nothing contained in Section 12, 13, 14, 21 and 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of competitors, or the services or facilities furnished by a competitor."

Article 13(b) Title 15 U. S. C. A.

Respondent's requested instruction appears at page 247 of the Record which was in substance a request that the Jury be instructed that under certain circumstances a person or corporation is justified in selling his or its products at one price in one place and another price in another place, and if the Jury found that the respondent sold its bread at the reduced price in good faith solely to break the boycott, their verdict should be in favor of the respondent, because it would have been deemed under the law to have been justified.

The request was refused (R. 247), and the court specifically instructed the Jury as follows:

"That agreement and that boycott, if it existed, would not be a defense to the plaintiff's cause of action" (R. 233).

Again:

"If that boycott existed, I specifically instruct you, shall not specifically consider it a defense to the plaintiff's cause of action" (R. 233).

The instructions of the trial court seems to obliterate any right of self defense regardless of the seriousness or nature of an attack. We do not know of anything more vicious or serious that could occur to a trading business than the boycott thrust upon respondent by the merchants in Santa Rosa admittedly without provocation. It is admitted that its business methods were fair in every respect (R. 75, 82, 89), and petitioner himself says that the "petition" started the "price cutting" (R. 76). He even recognized respondent's point of view when the boycott struck:

Q. "They sold their bread at this reduced price for the purpose of combating this attack or thing that was done to them, did they not? A. Well as you said a while ago, that is the way they looked at it, but I looked at it differently" (R. 89).

Mr. Moore tells us that the boycott was still 4/10ths effective when he closed his business (R. 94) February 28, 1950. This was one year and a half after the boycott struck on September 3, 1948 (R. 90), and 10 months after the price was raised on April 26, 1949 (R. 48). It would be a fair conclusion, then, that respondent raised the price of bread at a time when the boycott was still 40 per cent effective.

The respondent's Vice-president testified that he called on the merchants and tried to talk them out of the boycott,

but that they refused (R. 170). This left him with the alternatives of quitting the market or of cutting the price of bread (R. 171, 172). He further testified that the price reduction was made to break the boycott and was not directed at Mr. Moore (R. 175). He stated that if the merchants had at any time offered to take Mead's bread the price would have been raised (R. 175). Mr. Moore does not disagree with this because he swore that it was a fight between Mead's and the merchants (R. 213).

The boycott was a contemptible plot of destruction contrived in "little back room" methods. What course was open to Mead's? They could not counter in like kind. Were they required to yield? If so, what recourse was open to them? It was suggested that it could sue, but who would they sue? Not Mr. Moore, for he says it was a fight between Mead's and the merchants, and that he was not involved (R. 213). A suit against their former customers would be suicide. Seller-customer relationships are founded in service and quality of goods, not from lawsuits charging violations of antitrust laws. Practical business men would agree, that Mead's did the only thing that they could do, and that they were justified in reducing the wholesale price of bread.

The act itself provides that after a *prima facie* case has been made the burden then rests upon the accused to show justification and "unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination;—" It follows then that if justification is shown then the Commission could not issue the order. No reason appears to deny the accused of the defense as against a private litigant and grant such right of defense against the government. The aggrieved party acquires no greater right under the provisions than the governmental agency charged with enforcement. The remedy only differs.

The Fifth Circuit expressed the opinion that justification may be shown in *Gamco, Inc. v. Provident Fruit & Produce Company*, 194 F(2) 484; Cert. Den.; 344 U. S. 817; 73 S. Ct. 11; 97 L. Ed. 636.

In that case the accused refused the plaintiff space in a building located and designed to accommodate fruit and produce dealers that appeared to have certain business advantages. On the question of justification the court had this to say at page 488:

"The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes *prima facie* case of the purpose to monopolize. Defendants thus had the duty to come forward and justify Gamco's ouster."

At page 489:

"As indicated above, it is incumbent on one with the monopolist's power to deny a substantial economic advantage such as this to a competitor to come forward with some business justification."

Judge Phillips in his concurring opinion contained in the second decision of the Court of Appeals (*Moore v. Mead Service Co.*, 190 F(2) 540) was of the opinion that under the state of facts presented, Mead's ought to be allowed to show justification; and the facts being more fully developed in this case reflects greater reason to permit such showing.

We urge that the Act requires that any evidence that reasonably tends to justify a discrimination must be heard and passed upon along with *prima facie* evidence of the discrimination.

By this Section Congress did not limit the right of defense, it only strengthened the previous section by shifting

the burden of proof as soon as the minimum proof had been made. The "proviso" to Section 13(b) was added by the Robinson-Patman Amendment because of the stringent provisions of Section 13(a) and other parts of the Act, which, standing alone, could easily have resulted in confusion as to whether or not the meeting of a lower price of one competitor would be a discrimination as to other competitors not meeting the lower price. Such a situation could result in a discrimination as to one competitor and at the same time only a meeting the equally low price of the other. We do not believe that the Proviso part of the Section is a limitation of the first portion. It broadens it if anything.

The Congress and the Courts have at all times maintained a practicality in the enactment and application of antitrust laws, and for good reason. The intricacy and complexities of our economic system will not permit narrow, rigid rules of conduct. The Congress recognized this principle when it added Section 13(b) to the Act. Otherwise, untold mischief could and would have resulted not only to the trader but to the public the law seeks to protect.

We submit that the trial court erred in refusing the instruction, and that the error was not cured on a presumption that the jury based its finding upon Section 13a. We have no way of knowing what the jury believed or found, and since the verdict has been rendered under an incorrect instruction as to one of the two counts it may not stand. *Joseph C. Kelley v. Citizens Finance Company*, 28 NE(2) 1005, 130 ALR 890, also 53 Am. Jur. 723.

It is respectfully submitted that the Trial Court erred in refusing respondent's requested instruction.

ASSIGNMENT No. II

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO TAKE INTO CONSIDERATION ALLEGED DAMAGES CLAIMED TO HAVE RESULTED FROM AN ALLEGED VIOLATION OF SECTIONS 13(a) AND 13a, TITLE 15 U. S. C. A., DURING A TIME IN WHICH THE ACCUSED WAS NOT ENGAGED IN COMMERCE.

The trial court instructed the jury that in assessing damages it could take into consideration losses accruing between September 3, 1948, and the time Mr. Moore closed his shop in February of 1950.

"In determining damages, if any, you may consider as one of the elements to be taken into consideration plaintiff's lost profits between the period of September 3, 1948, and the time when he discontinued his business in February of 1950.—" R. 231.

You may further take into consideration as one of the elements of damage, if any, the extent to which the value of plaintiff's property had been diminished as the result of defendant's wrongful acts. There has been evidence as to the value of plaintiff's property on September 3, 1948, and the value on or about February 28, 1950, when plaintiff discontinued his business. The difference in this value may be considered by you as one of the factors in arriving at plaintiff's loss in his business and property." R. 231.

Respondent preserved the point in its exception to the court's charge at page 240 of the Record:

"The Court's charge permits the assessment of damages arising from acts accruing at a time when this defendant wasn't engaged in commerce, and at a time when the purchases involved in such discrimination were not in commerce." R. 240.

The point was specifically pointed out in respondent's Motions for Judgment and New Trial. R. 20 and 33.

The stipulation at page 132 of the Record reflects that Mead's began its shipments into Farwell on December 27, 1948, nearly 4 months after the boycott and price cut started on September 3, 1948. R. 48. During the period from September 3, 1948, to December 27, 1948, no sales were made in interstate commerce.

The stipulation at page 132 of the Record also reflects that respondent had been making sales in Farwell prior to the time they first went into Santa Rosa, but deliveries there had been terminated on January 16, 1948, which was about the time Mead's went into Santa Rosa in January of 1948. The exact date is unknown; and, if it were material, the burden of proof was upon the petitioner to make such showing. In any event a showing of past purchases is insufficient. *Shaw's Inc. v. Wilson-Jones Co.*, 105 F(2) 331.

The absence of interstate sales does not satisfy the requirement of Section 13(a) that the "purchases involved in such discrimination" must be in commerce, nor does it fulfill the requirements of Section 13a that sales be made "in the course of such commerce." We have heretofore pointed out that petitioner's theory of liability is in full accord with this assignment, and respectfully requests that the authorities and argument under Part A, Section 12 hereof be considered hereunder.

Section 15 (Title 15 U. S. C. A.) grants a right of action for injury to business or property—

“—by reason of anything forbidden in the anti-trust laws——.”

but the alleged forbidden act, if forbidden at all, could not have been committed until the Farwell sales started. Perhaps under proper circumstances recovery could be had under the state statute; but since a thing forbidden by the Federal Act was not committed by reason of the absence

of interstate sales, the trial court erred in permitting the jury to take into consideration alleged damages claimed to have been sustained between September 3, 1948, and December 27, 1948.

The excessive verdict of the jury and the judgment of the trial court demonstrates the harm resulting from the erroneous instruction; and when viewed in the light of petitioner's evidence on the matter of damages as hereinafter discussed, the matter of the excessiveness of the verdict becomes more apparent.

It is respectfully submitted that the action of the Court of Appeals in reversing this cause is correct.

ASSIGNMENT NO. III

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO TAKE INTO CONSIDERATION LOSS OF VALUE OF PROPERTY WHERE THE EVIDENCE SHOWS CONCLUSIVELY A GREATER MARKET VALUE AFTER THE ALLEGED UNLAWFUL ACT THAN BEFORE SAID ACT.

Petitioner sought to establish a diminished value of his bakery equipment by proof of value before and after the alleged wrongful act.

The court charged:

"You may further take into consideration as one of the elements of damage, if any, the extent to which the value of plaintiff's property had been diminished as the result of defendant's wrongful acts. There has been evidence as to the value of plaintiff's property on September 3, 1948, and the value on or about February 28, 1950, when plaintiff discontinued his business. The difference in this value may be considered by you as one of the factors in arriving at plaintiff's loss to his business and property." R. 231.

Respondent pointed out the deficiency of the proof in his Motion for Instructed Verdict at close of petitioner's evi-

dence (R. 200), again at the close of all evidence, (R. 218) argued to the court (R. 218), in its objection to the court's charge (R. 240) and Motions for Judgment and New Trial, R. 33 and 21.

Mr. Moore testified to various purchases of second hand equipment beginning in 1940 (R. 41-23), and testified that his bakery was fully equipped by the end of 1947, (R. 43). He placed a value of \$15,559.34 on his physical plant or equipment in 1947, and fixed his "going concern value" or goodwill at \$7,500.00 in 1947. He then estimated his "going concern value" and physical plant at \$23,459.34, on September 1, 1948 (R. 43, 44), but gives us no separate goodwill figure. Using his 1947 goodwill estimate would leave the physical plant or equipment value on September 1, 1948 at \$15,959.34, which is not materially different from the figure given for the end of 1947. He testified that the equipment increased in value because of steel shortages and rising prices, but did not establish how much. R. 44. He offered no proof on depreciation other than to say it was "very, very little." R. 44. Mr. Moore further testified that from January 1, 1948, until the day he closed his plant, it was substantially the same. R. 211.

The petitioner then called his witness, Mr. Englehart, who said he was familiar with the values of bakery equipment (R. 159), and testified that he was in Mr. Moore's bakery in 1949 or 1950, he couldn't remember which (R. 155), but said the price war was over when he was there. R. 161. The price on bread was raised on April 26, 1949, R. 49. Mr. Englehart placed a market value of \$20,000.00 on the equipment at the time he was there (R. 160), and testified that the rise in prices would "take care of the depreciation" (R. 161), and that the market value fixed by him would be the same for 1 year after he saw it. R. 162. The \$20,000.00 value would then extend beyond the time

Mr. Moore closed his shop on February 28, 1949. R. 49. The evidence establishes no loss of value of property; therefore, the trial court erred in permitting the jury to take loss of value of property into consideration.

It is assumed that the following testimony offered by the petitioner was intended to have some bearing on the point.

Mr. Moore testified on direct examination—"it stopped in September—April 26, 1949 (speaking of the price cut) and I remained in business through '49 and until February, the last of February of 1950. Q. Then, what happened? A. I was forced to close up. Q. Was your business solvent at that time? A. Yes, sir." R. 49.

At pages 57 and 58 of the Record he testified that he had borrowed \$10,000.00 from Reconstruction Finance Corporation and when he went out of business he had one Chevrolet panel truck, valued at \$550.00, left over and some odds and ends and small equipment; and that a representative of Reconstruction Finance Corporation sold all the equipment mortgaged to it.

The foregoing testimony does not contradict the testimony of his witness, Englehart. Mr. Moore does not say what he received for the equipment nor does he place a value on that part not sold. The petitioner has chosen to establish his loss by proof of market value before and following the alleged wrongful acts which is the general rule governing the establishment of damages to personal property. 25 CJS at page 597. Mr. Moore called the witness, Englehart, vouched for his credibility and qualified him as an expert. He then had the witness fix a market value of \$20,000.00 on the equipment that stood good for a period of one year after the time he saw it, following the "price war". R. 160-162. This valuation would expire two months or more after petitioner closed his shop on February 28, 1950. R. 49.

The only proof of value before the alleged wrong was the testimony of Mr. Moore himself and he fixed the value at \$15,959.34. If the market value of the equipment depleted at any time during the year following the date Mr. Englehart saw it, the cause was not shown. Petitioner makes no charge of any illegal or wrongful act on the part of the respondent during the year following the "price war." So if there was a depression in value after the witness saw the equipment, it was the result of some cause other than the alleged acts of this respondent.

The petitioner does not contradict the testimony of his witness. All he says is that he kept some of the equipment and sold some. What he received is not shown. In any event he could not be heard to complain if he disposed of the equipment for less than its proven market value. Only Mr. Moore knows what he received and for some reason did not choose to give the jury the facts. When he put Mr. Englehart on the stand, he vouched for his credibility and offered nothing to contradict his testimony. The testimony of the witness not being inherently improbable and not shown to have been due to mistake, is binding upon the petitioner. *Jacobson v. Hahn*, 88 F(2) 433; *Luke v. United States*, 84 F(2) 711; Cert. Den.; 299 U.S. 542; 47 S. Ct. 45; 81 L. Ed. 399; *Yellow Cab Co. of Philadelphia v. Rodgers*, 61 F(2) 729; *Emerald Oil Company v. Commissioner of Internal Revenue*, 72 F(2) 681.

The petitioner's measure of damages was susceptible of proof and he proved that he suffered no loss. Any other conclusion would read into the evidence testimony that is not there.

To find the fact of damage would require a repudiation of Mr. Englehart's uncontradicted testimony and a speculation and conjecture without basis in the evidence.

The petitioner must not only establish the fact of damage

with reasonable certainty, but he must go further and furnish data and information from which his loss could be reasonably estimated or calculated. *Story Parchment Company v. Patterson Parchment Paper Company*, 282 U.S. 555; 51 S. Ct. 248; 75 L. Ed. 544; *Bigelow v. RKO Radio Pictures*, 327 U.S. 251; 66 S. Ct. 574; 90 L. Ed. 652; *Kobe, Inc. v. Dempsey Pump Co.*, 198 F(2) 416, Cert. Den.; 344 U.S. 837; 73 S. Ct. 46; 97 L. Ed. 651.

"—an individual right of recovery is dependent on proof of legal injury to him, and legal injury is not automatically established by proof of a restraint of trade in violation of the Sherman Law." *Bigelow v. RKO Radio Pictures, Inc. (supra)*.

The petitioner failed to establish a legal injury or damage and certainly failed to furnish data or information concerning his alleged injury to property from which a reasonable person could draw any conclusion other than the fact that the property was worth \$15,959.34, before the alleged price cut and \$20,000.00 for more than a year afterwards. No injury having been shown the trial court erred in submitting the instruction to the jury.

It is submitted that the Court of Appeal's reversal of the cause should be affirmed.

ASSIGNMENT No. IV

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO TAKE INTO CONSIDERATION ALLEGED LOSS OF PROFITS WHERE THE EVIDENCE FAILS TO ESTABLISH WITH REASONABLE CERTAINTY THAT THE COMPLAINING PARTY COULD HAVE MADE A PROFIT IN THE ABSENCE OF THE ALLEGED WRONGFUL ACT AND FAILS TO FURNISH INFORMATION FROM WHICH THE JURY COULD, WITH REASONABLE CERTAINTY, ESTIMATE THE LOSS.

The trial court erred in permitting the Jury to take into consideration lost profits in arriving at its verdict for the

reason that the petitioner did not at any time claim or make a showing that he could have made a profit on bread at any time in open and fair competition with Mead's after they came into the market in January, 1948.

The Court charged the Jury:

"In determining damages—(R. 231) if any, you may consider as one of the elements to be taken into consideration plaintiff's lost profits between the period of September 3, 1948, and the time when he discontinued his business in February, 1950. It is simply one of the factors which you may take into consideration in arriving at a determination of the amount of damages you may find and believe from the evidence was sustained by plaintiff to his business and property" (R. 231).

At page 243 the Court gave additional instructions wherein he limited the Jury to loss of profits on bread.

The respondent pointed out the deficiency in the proof in its motion for instructed verdict at the close of petitioner's evidence:

"The plaintiff has failed to establish any evidence to any degree of certainty that he would have made a profit on bread at any time about which complaint is here made. That the plaintiff has failed to prove by substantial evidence, nor has he proven at all that he has lost or failed to make a profit he would have made in the absence of the sale of Mead's bread at the reduced price" (R. 200).

The exception was again pointed out at the close of evidence (R. 198 and 218), argued to the court (R. 218) and again in its objection to the court charge (R. 239, 240 and 241) and motions subsequent to verdict and judgment (R. 18, 19, 33).

For the evidence on this point, we look again solely to Mr. Moore's testimony, and with his 18 years experience

let him evaluate his business before the boycott or price disturbance in Santa Rosa.

When Mead's first came into Santa Rosa in January, 1948 (R. 47), he said he concluded that there was not enough business there to support him and an out of town bakery (R. 76). He decided then that the thing to do was "get out of town" (R. 76, 82), and proceeded to rent a building in another town (R. 76). He stated repeatedly that he could not "exist" in Santa Rosa with Mead's in the market with him (R. 82, 84, 89, 212 and 213), and that he could not "make it" with them there (R. 82). He stated that he had only two alternatives "either to close down or move out" (R. 82). This conclusion was reached in January, 1948, and the price cut did not take place until 8 months later on September 3, 1948 (R. 76, 82). He agreed that during this period Mead's did not take any unfair advantage of him, and that they were legitimate business men (R. 75, 82, 89).

Q. "You knew in January after Mead's got there your business wouldn't be profitable with Mead's in town on a fair basis? A. Well, the size of the town wasn't large enough for anyone to run in. Q. But your business would not be profitable with Mead's in town on a fair basis would it? A. Well, I wouldn't confine it to Mead's. Q. Well, Mead's or anybody else in town on a fair basis. A. That wouldn't be considered fair basis when you consider the size of their operation and mine." (R. 212).

He testified that he had no loss of sales on cakes, pastries and specialty breads (R. 69). He limits his complaint to white bread and doesn't remember about wholewheat bread (R. 69, 76). The price was cut on bread alone and only in the town of Santa Rosa (R. 97, 48, 69), and he lost no sales outside the town of Santa Rosa (R. 49).

He had previously testified to a break-even point on production of bread and had stated that to "be in the black"

he had to bake "at least eight thousand loaves a week, pounds" (R. 103-4). But having gone over the production figures previously given by deposition covering months before and after the price reduction period, he very quickly disavowed his previous testimony; and stated that it "was impossible for me to tell them where I quit making money, where I started making money——" (R. 105) and admitted that by using the 8,000 pound figure, he did not make any money on bread (R. 108). At page 108, he testified "But right there where you were situated, the volume of business you had on bread produced no profit, but you did produce some profit on your pastry business, didn't you? A. Yes." At page 109—Q. "Then you don't know whether you made any money in the bread business or not, do you? A. I only know I went broke in the bread business. Q. You don't know whether you made a dime in the bread business during the years '48 and '49? A. Well, my income tax return——. Q. I didn't say that, sir. I said do you know whether or not you made any money in the bread business during the years 1948 and 1949? A. No; I made very little. Q. Did you make any profit? Do you know that to be a fact? A. I can't put my finger on a figure. Q. Then you don't know whether you made a profit or not, do you? A. Well, I have a good idea. Q. Do you know whether or not you made any profit on bread back in 1947? Well, that goes back to the question—— A. Answer my question, Mr. Moore, please. A. As I said—— Q. Answer the question please. (Objection.) A. If I answer yes or no, it makes a big difference. The court: Make any explanation you desire. A. All Right. You asked if I knew whether I made any money in 1947. Q. That's right. A. Well, the only figure I could give you would be my income tax and it shows a small profit. Q. But you don't know whether you made it in the cake business or pastry business or made it in the bread business, do you? A. I never separated them; I can't put

my finger on it. Q. You don't know, do you? A. In my own mind I know. Q. I didn't ask you that. Do you know, sir? A. *I will have to say no*" (R. 109, 110).

At page 110—"So you don't know whether you made a dime in the bread business in 1947, 1948 and 1949, do you? A. Well, I have to refer to my income tax— Q. Answer the question, sir. A. How can I answer it when I don't have any figure to answer with?"

The Record is utterly barren of any evidence that Mr. Moore ever made a profit on bread at any time, and, in particular, in open and fair competition with respondent. The petitioner frankly admits that he makes no claim for loss of any item other than bread (R. 69). *Mr. Moore's attorney never at any time during the trial of the case even inquired into whether or not Mr. Moore ever made a profit on bread.* His inquiry concerned only profits in general and petitioner's income tax returns (R. 54, 56) which, of course, included all income and established nothing.

To recover for loss of a thing it must be shown to have at least existed. Here petitioner refused to say whether or not he made a profit on bread. He knew that his answer yes or no "made a big difference" (R. 109), but he was totally unwilling for some reason to say that he *ever* made a profit on bread. However, he is quite sure that he made no profit on bread during the eight months period he had open competition with respondent:

Q. "And when Mead's came in there selling bread and offering bread at the same price you were offering it. A. Yes, sir. Q. Your business wasn't profitable. A. That's right." (R. 213). Q. "But right there where you were situated, the volume of business you had on bread produced no profit, but you did produce some profit on your pastry business, didn't you? A. Yes." (R. 108).

The petitioner at best says he does not know whether or not he ever made a profit on the sale of bread, but the last testimony is an admission that he did not make such a profit when Mead's appeared in the market. The measure of damages could be the difference between the profit actually realized and the profit he would have realized in the absence of the price cut (*American Crystal Sugar Co. v. Mankerville Island Farms*, 195 F.(2) 622 cert. den., 343 U. S. 957; 72 S. Ct. 1652; 96 L. Ed. 1306 and we think the applicable rule is well stated by the Supreme Court of Arkansas in *United States Auto Company v. Arkadelphia Milling Company*, 215 S. W. 641, at page 642:

"Uncertainty as to the amount of damage does not prevent recovery, but uncertainty as to whether any benefit or gain would have been derived at all does bar a claim for damages" (Citing numerous authorities).

"However, where actual pecuniary damages are sought, there must be evidence of their existence * * * 25 C. J. S. at page 496.

On this question Judge Brandeis in *Keogh v. Chicago & N. W. Ry. Co.*, 260 U. S. 156 at page 165; 43 S. Ct. 47 at page 50; 67 L. Ed. 183, had this to say:

"These damages must be proved by facts from which their existence is logically and legally inferable."

Again in *Rigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251 at page 267; 66 S. Ct. 574 at page 580; 90 L. Ed. 652:

"* * * an individual's right of recovery is dependent upon proof of legal injury to him, and legal injury is not automatically established by proof of a restraint of trade in violation of the Sherman law."

The fact of damage must be established with reasonable certainty. *Rigelow v. RKO Radio Pictures, Inc.* (*supra*);

Story Parchment Company v. Patterson Parchment Paper Company, 282 U. S. 555; 51 S. Ct. 248; 75 L. Ed. 544; *Telluride Power Company v. Williams*, 172 F(2) 673.

Only a singular conclusion can be drawn from petitioner's proof. He predicated his claim upon loss of a thing that was not in existence. It is quite obvious that if he made a profit before Mead's came, it was negligible; but it must be remembered that he was operating virtually without competition (R. 67, 74); and when called upon to operate in an equal competitive market, he admits that he could not make a profit on bread. If he suffered a loss at all, it was an operating loss and not a loss of profits which are two entirely different things. The manner of proof itself would differ materially.

It is respectfully submitted that petitioner having failed to establish with at least reasonable certainty that he would have made a profit in bread sales, in the absence of the price reduction, the trial court erred in permitting the Jury to take loss of profits into consideration in arriving at its verdict.

For a second part of this argument, we call this court's attention to the testimony of Mr. Moore at pages 71-73 of the Record, where he testified that based on his experience in the bakery business in and out of Santa Rosa, a bakery business like his located in Santa Rosa would customarily make 10 per cent. He does not limit his testimony to bread, his testimony is to a "customary" profit in the bakery business which would include cakes, pastries and other items.

If we should disregard his testimony that he did not know whether or not he made a profit (R. 105, 109, 110), that he did not make a profit on bread (R. 108, 212, 213) and other statements that certainly support the latter, and let the Jury decide the question; it must first speculate on and guess at what his profit on bread was. It certainly cannot

be reasonably estimated. To start with, the "customary" 10% is not limited to bread. Second, it is not complied or arrived at by reference to any data or information from his records or business. He explains the figure when he says, and we use his words, "That is a figure you hope with efficient operation and no interference that you *try* to arrive at" (R. 108-9). It is difficult to determine what this man means by "interference". Fair and equal competition is an "interference" to him. The ten per cent then is a goal, a par excellent so to speak, for the industry in his locality. But he does not claim to have ever made the 10 per cent; in fact in the following question, he said it was a "hoped figure" in his case (R. 108, 109). He gives us no information concerning his "efficiency" from which the jury could even speculate on how near he could have approached par. The second guess would be loss of sales.

Mr. Moore, with the help of an auditor prepared a chart or graph representing concurrent months of the year before and during the price cut which reflects that he may have lost some sales during that period only (Plaintiff Exhibit No. 1).

But we fail to find a positive statement that he lost sales after the price was raised, nor do we find any estimate or data from which such loss could be reasonably estimated. In fact, during the last 13 months of his operation he did a gross business of \$74,270.00 as compared with \$47,742.63 the year immediately preceding the time Mead's first came into the market with him (R. 55, 56).

It is interesting to note that on cross examination, Mr. Moore took the figures reflected by the chart and determined the difference in sales between the period of the price cut and the same period for the previous year; upon doing this it was determined that his total loss of profit was \$299.72 when the "customary" ten per cent was applied to the lost gross business for the entire period of the price cut (R. 99, 100, 103).

Mr. Moore admitted twice that, assuming the ten per cent figure was correct, \$299.72 was the correct amount of his loss (R. 100 again at 103).

The result was also checked against other figures previously given and the result was practically the same—\$285.59 (R. 103).

With reference to any loss of sales after the price cut, the jury had no help from the petitioner, so they had to speculate on that also.

To arrive at petitioner's loss of profits under the evidence presented, the Jury had to waive aside his testimony that he did not make a profit (R. 108, 212, 213) and that he did not know whether he made a profit or not, (R. 105, 109, 110); then speculate as to what his profit was on bread, and then take a guess at what his loss of sales amounted to.

We respectfully submit that the evidence upon which the verdict was rendered was based on speculation and guesswork and not data and information from which the Jury could reasonably calculate or estimate his loss, as required by the authorities. *Bigelow v. RKO Radio Pictures*, 327 U. S. 251; 66 S. Ct. 574; 90 L. Ed. 652; *Eastman Kodak Company of New York v. Southern Photo Materials Co.*, 273 U. S. 359; 47 S. Ct. 400; 71 L. Ed. 684; *DePalma v. Weinman*, (N. M.) 103 P. 782, 15 N. M. 68, 24 L. R. A. N. S. 423; *Kobe, Inc. v. Dempsey Pump Company*, 198 F(2) 416, Cert. Den.; 344 U. S. 837; 73 S. Ct. 46; 97 L. Ed. 651.

It is urged that the petitioner has failed to establish the existence of the profit he sues to recover and has failed to furnish the Jury with relevant data and information from which his loss could be reasonably estimated. It is prayed that the judgment of the Court of Appeals in reversing the trial court be affirmed.

PART C

ADDITIONAL REASONS WHY THE JUDGMENT OF THE TRIAL COURT CANNOT STAND.

I

WHERE THE COMPLAINING PARTY SEEKS TO RECOVER LOST PROFITS AND LOSS OF VALUE OF PROPERTY AND MAKES NO CLAIM OF PROOF OF OTHER DAMAGE AND FAILS TO PROVE THAT HE LOST PROFITS OR THAT THE VALUE OF HIS PROPERTY WAS DIMINISHED, HE MAY ONLY RECOVER NOMINAL DAMAGES IN AN ACTION FOR PRICE DISCRIMINATION, PROVIDED ALL OTHER ESSENTIAL ELEMENTS NECESSARY TO RECOVERY APPEAR.

The petitioner based his claim for damages on (a) loss of profits and (b) loss of value of property.

The respondent has fully discussed each of these theories of recovery under Assignments III and IV, and begs leave of Court to make reference to the evidence, authorities and argument there presented in support of this Assignment.

The petitioner having elected to sue for profits but having failed to prove with reasonable certainty that he would have made a profit in the absence of the alleged discrimination, has failed to establish the fact of damage and recovery should be denied. Further, the petitioner sued for loss of value of property and sought to establish such loss by proof of market value before and following the alleged wrongful act. But, the uncontradicted evidence in the case is that the value of equipment was greater following the alleged unlawful acts than it was preceding such acts. No damage having been shown, recovery must be denied. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251; 66 S. Ct. 574; 90 L. Ed. 652; *United States Auto Company v. Arkadelphia Milling Company*, 215 SW 641; *Kobe, Inc. v. Dempsey Pump Co.*, 198 F(2) 416 at page 425-6, Cert. Den., 344 U. S. 837; 73 S. Ct. 46; 97 L. Ed. 651.

For further reason, the petitioner failed to furnish relevant data and information from which his alleged loss

of profits or loss of value of plant could be reasonably calculated or estimated and any verdict rendered would be based on mere speculation and conjecture. Having failed to discharge the burden of proof upon him, recovery should be denied. *Bigelow v. RKO Pictures, Inc.* (*supra*); *Kobe, Inc. v. Dempsey Pump Co.* (*supra*).

The respondent sought recovery for loss of profits and loss of value of property and presented no proof on any other theory of damage. Having failed in each instance to establish the fact of loss or damage and discharge the burden of proof upon him, he may only recover nominal damages, provided all other essential elements necessary to recovery have been shown.

Respondent, without waiving its position on points urged in support of the Court of Appeal's decision says that if the petitioner be entitled to any recovery it should be limited to nominal damages.

II

WHERE THE COMPLAINING PARTY IN AN ACTION FOR TREBLE DAMAGES FOR VIOLATION OF THE ROBINSON PATMAN ACT SUES TO RECOVER LOST PROFITS, LOSS OF VALUE OF PLANT, ATTORNEY FEES AND COSTS, BUT FAILS TO PROVE LOSS OF PROFITS OR LOSS OF VALUE OF PLANT, A JUDGMENT OF \$19,000.00 TREBLED FOR SUCH ALLEGED LOSS IS EXCESSIVE AND AN ALLOWANCE OF \$11,400.00 ATTORNEYS FEE IS UNREASONABLE AND EXCESSIVE.

The respondent has discussed at length its contention with respect to the absence of proof of the existence of profit on bread on the part of petitioner under Assignment IV and for the sake of brevity respectfully refers the court to the discussion of the evidence and authorities there discussed and requests that they be considered under this assignment.

The respondent has also set forth and discussed at length its contention with respect to the lack of proof of loss and authorities on loss of value of property under Assignment

III and for the sake of brevity respectfully requests that the same be taken into consideration under this assignment.

With the foregoing in mind special effort will be made as much as possible not to repeat or overlap the material contained in the assignments.

Without prejudicing its position in other assignments, respondent urges that the verdict of the Jury is excessive and without justification under the evidence. The price cut lasted 7 months, 23 days, and petitioner admits twice that his total loss of profit, if we use the so-called "customary" 10% profit figure, was \$299.72 for the period of the price cut. R. 100-103. He also says that the figures on the chart (Plaintiff's Exhibit 1) are accurate. R. 51. Mr. Moore remained in business until February 28, 1950, (R. 49), which was 10 months and 2 days after the price on bread was raised on April 26, 1949. R. 49. He tells us that he had a sharp increase of business after the price on bread was raised on April 26, 1949, (R. 52), (See also Plaintiff's Exhibit 1), so it would be reasonable to assume that the loss of gross sales on bread would have diminished after the price was increased. In fact his bread was sitting on the shelves of the 5 best stores in town without competition which was an advantage he was not entitled to but did receive. R. 93. In all the rest of the stores his bread was sitting along side Mead's. R. 94. He never did say that he lost business after the price was raised nor does he make any estimate of any business he may have lost. If he lost any at all, it was negligible; but we think the more reasonable conclusion would be that because he was holding the 5 stores alone, his volume was far greater than it would have been if things had been on a fair basis. This is indicated by the fact that during 1947 Mr. Moore had a gross volume of \$47,742.63, (R. 55), but in 1949 and one

additional month in 1950, he did \$74,270.53 gross business, (R. 56) which included two months of the price cut.

Assuming, for argument purposes, that he did lose some business during the remainder of the time he continued in business, he says his volume went up with the increase of price. Clearly, the loss could not have been as much for the remaining 10 months and 2 days as it was for the 7 months and 23 days of the price cut, during which period, he says his loss was \$299.72. If it was as great the total amount would not have exceeded \$400.00.

There is no basis for the verdict on the lost profit theory.

Now with respect to the loss of value of plant. We have pointed out that he fixed the value of \$15,959.39 on his physical property on September 1, 1948, (R. 44) (Goodwill \$7,500.00 subtracted from goodwill and physical value of \$23,459.34 (R. 44)) and his witness, Mr. Englehart, testified that his equipment had a market value of \$20,000.00 (R. 160) when he saw it after the "price war" was over, (R. 161) and that the \$20,000.00 market value of equipment prevailed for a year after he saw it. R. 162. This made that market value continue for over two months after Mr. Moore closed his plant in February 28, 1950. R. 49. Mr. Englehart's testimony stands undisputed, so there is no loss of value of plant that would support the jury's findings.

Now with respect to goodwill or "going concern value." The respondent objected to the court's charge because it permitted the Jury to consider loss of goodwill in arriving at its verdict (R. 240). We have some misgivings about the effect of the charges on this. However, the only testimony on the point is that of Mr. Moore when he was talking about the value of his plant in 1947.

Q. "What do you value goodwill? A. I consider my goodwill worth seventy-five hundred dollars." (R. 44).

He makes no explanation of how he arrived at the figure. It was given as of a time when the petitioner held 90% of the business in town (R. 67, 68), and was a concern that could exist in its market. But, Mead's came in during January of 1948 (R. 47) and the situation changed to such an extent that he had to close up or get out of town (R. 76, 82, 84). He couldn't exist with Mead's in town on a fair basis (R. 212, 82, 84, 213). We submit, a business that must close up or move out of its old place of business would have little or no going concern or goodwill value. Manifestly the changed condition rendered the value placed on his goodwill in 1947 too remote. *St. Louis I. M. & S. Ry. Co. v. Miller*, Sup. Ct. Ark., 154 SW 956. We have no other proof of any character on the question of goodwill, and nothing is here found to support the Jury's verdict.

We think the damage, if any were suffered, or proved at all, is a matter of computation, and that the maximum recovery would be \$299.72 loss of profits. The proof with respect to loss of value of property reflects no loss and no other element of damage has been shown.

We urge that the award of the Jury is far out of proportion to the loss suffered and is a result of prejudice or mistake on the part of the Jury. We pray that the amount be reduced by this Court.

Respondent further urges that the attorney fees allowed by the court is excessive for the reason that he allows nearly as much to petitioner's attorney as was awarded by the Jury in damages. The jury awarded \$19,000.00 damages and the Court without hearing any evidence on the matter, allowed \$11,400.00 attorneys' fee (R. 32). An allowance of so great an attorney's fee under the circumstances presented has been held excessive and reduced in *Milwaukee Towne Corp. v. Leow's, Inc.*, 190 F(2) 561; cert. den., 342 U. S. 909; 72 S. Ct. 302; — L. Ed. —. It is respectfully

urged that the amount allowed as attorneys' fee is excessive and should be reduced.

Conclusion

Without waiving or prejudicing its prayer for affirmance of the decision of the Court of Appeals in reversing and directing the dismissal of petitioner's action for each of the reasons set forth in that Court's opinion and Part A of this Brief, respondent prays that the cause be reversed for new trial for each of the reasons set forth in Part B hereof; that in the alternative that petitioner's recovery be limited to nominal damages, or in the alternative that the amount of the judgment be reduced to \$400.00 and that the attorneys fee allowed be reduced proportionately.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

Petitioner

vs.

MEAD'S FINE BREAD COMPANY, A Corporation,

Respondent

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT**

REPLY BRIEF FOR THE RESPONDENT

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By Edward W. Napier;

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SUPREME COURT OF THE UNITED STATES
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MEAD'S FINE BREAD COMPANY, A Corporation,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

Statement

Most of the matters raised by the petitioner in his Reply Brief have been covered by respondent in its original brief and every effort possible shall be made to avoid redeveloping matters previously argued which would serve as a reply. The petitioner draws conclusions from the record throughout his reply which respondent deems wholly unjustified and utterly without support; however, the correct factual situation of this case has been reasonably well developed by respondent in its original brief and in the interest of brevity; issue will be avoided wherever possible.

every phase of that business though it be wholly intrastate. He writes off completely such authorities as: *The Shreveport Case* (*Houston E. & W. T. R. Co. vs. U. S.* 234 U. S. 342; 34 S.Ct. 833; 58 L.Ed. 1341); *Mandeville Island Farms vs. American Crystal Sugar Co.* 334 U. S. 219; 68 S.Ct. 996; 92 L.Ed. 1328; *U. S. vs. Wrightwood Dairy Co.* 315 U. S. 110; 62 S.Ct. 523; 86 L.Ed. 726; *Wickard vs. Filburn*, 317 U. S. 111; 63 S.Ct. 82; 87 L.Ed. 122; *U. S. vs. Darby* 312 U. S. 100; 61 S.Ct. 451; 85 L.Ed. 609; and *Atlantic Co. vs. Citizens Ice & Cold Storage Co.*, Fifth Cir., 178 F(2) 453, Cert. Den. 339 U. S. 953; 70 S.Ct. 841; 94 L.Ed. 1365, holding; that Federal regulation extends only to those local activities which in some substantial way affect interstate commerce.

He relies upon *Sun Cosmetic Shoppe vs. Elizabeth Arden Sales Corp.* Second Cir., 178 F(2) 150, which completely fails him for there interstate commerce itself was the very thing utilized to commit the alleged forbidden act. In that case the plaintiff alleged that it was one of the defendant's "agencies" to sell Elizabeth Arden products at its retail cosmetic shop in the City of New York serving customers in New York and New Jersey. It alleged that the defendant had its place of business in New York and sold its products broadly throughout the United States, including New York and New Jersey; and that defendant supplied some agencies in New York and New Jersey with "demonstrators" whose salaries were paid in whole or in part by the defendant; but that the plaintiff was not among those to whom the defendant furnished such a demonstrator. The trial court summarily dismissed the action on the grounds that the transactions between the parties were not in interstate commerce and not covered by Sections 13 (d) and (e), Title 15 U.S.C.A. The Second Circuit held that under the allegation the plaintiff should be entitled to prove damages flowing

"from the diversion of its customers to those of New Jersey agencies to whom the defendant furnished demonstrators so far as that was due to the 'demonstrators' ". Clearly, interstate commerce there was utilized to enable competitor "agencies" in New Jersey to compete unfairly with the plaintiff for the New Jersey business which distinguishes it from this case. With respect to losses alleged to have resulted from competition of favored agencies in New York, the court stated that the point was not argued, but concluded that "the question would be whether it was essential to include intrastate sales in order to effectively prevent discrimination in commerce." The court further stated:

"It would not inevitably follow that the act would have been beyond the power of Congress, even though it had expressly prescribed that a seller should not discriminate between his intrastate customers as well as between his interstate; **for it might be necessary to go so far, in order effectively to prevent discrimination between interstate customers.** If it had been necessary, the situation would be within the doctrine of the **Shreveport case.**"

The court did not hold or imply that it would hold that the intrastate activity was within the prohibitive provisions of the Acts in the absence of proof that it was necessary to do so to prevent discriminations between interstate customers. In fact it makes specific reference to The Shreveport Case (supra) which brings within the Federal power intrastate activities that affect interstate commerce in such a way that Federal regulation is necessary to effectively regulate interstate commerce.

The petitioner cannot escape the proposition that in order for the Acts to apply to his case it must be made to appear that interstate commerce was either utilized or substantially

affected by the sales in the single town of Santa Rosa at the reduced price. He does not contend that the sales made by respondent in Farwell were a means to recoupe losses sustained by the sales in Santa Rosa; for if it were his argument, and if such were the facts, the respondent's efforts in that behalf fell miserably short of such an intended goal. In any event such is not the case made out by the petitioner upon the trial of this case. We have fully examined the factual situation with respect to affect and utilization of interstate commerce in our original Brief under Part A and respectfully refer the court thereto.

The above quotation taken from page _____ of the Reply Brief does concede that an indispensable ingredient of his action is sales in commerce. This in itself condemns it during the first 3 months and 24 days of the period of the price cut unless he can show facts that would justify treating the sales of the two bakeries in Texas as though they were sales of the respondent. But even so, it must also be made to appear that the sales in the single town of Santa Rosa substantially affected interstate commerce or that such commerce was utilized in the making of such sales.

On the question of the two Texas Corporations it is most significant that the petitioner does not argue, because he cannot, that the owners of stock in respondent also owned all or a controlling interest in the Texas corporations. As petitioner states it is not clear in the record when the Big Spring corporation existed, but it is quite clear that the Lubbock, Texas, corporation was in existence during the time in question, and it is equally clear that the petitioner never at any time even inquired about its ownership other than to establish that the owners of stock in respondent also owned stock in the Lubbock, Texas, corporation. The amount or percentage was not established. He only inquired whether

or not they owned stock in the Texas corporations. Further it is not shown who the directors were or how many there were. In the absence of proof that at least one or more of respondent's stockholders owned at least a controlling, if not the entire, capital stock in the Lubbock corporation, the alter ego or instrumentality principle could not apply under the state of facts presented and set out in our Brief. That his proof falls short of that required to apply the principle is clearly demonstrated in *Collins Baking Co. vs. N.L.R.B.*, Fifth Cir., 193 F(2) 483, cited by petitioner and relied upon by him.

That case involved an unfair labor practice charge under the National Labor Relations Act. The petitioner raised the question of the Boards jurisdiction which presented the question, simply stated, whether or not interstate commerce would be affected if, by work stoppage, the flow of materials from out-of-state were cut off. The court found that the dollar value of the interstate flow to be adequate to confer jurisdiction under the act, but to compound the matter the Circuit Court made reference to the proven fact that Campbell-Taggart, which owned 49 bakeries throughout the United States, also owned the controlling interest in petitioner in that case.

The petitioner (in our case) quotes these facts in his brief:

"Moreover, petitioner is an integral part of Campbell-Taggart Bakery Service Corporation, which owns or controls 49 baking companies located in numerous states. It also owns the controlling interest in petitioner's common stock—."

Such proof of ownership or control does not appear at all in this case.

Respondent respectfully submits that the petitioner's contention is incorrect and that if adopted the last vestige of any distinction between Federal and State authority would belong to the recorders of history.

2. The respondent was entitled to have the jury pass upon the question of whether or not it was justified in selling its bread at the reduced price in an attempt to remain in its lawful market destroyed by the boycott.

The petitioner's contention that the defendant's defense of justification was submitted to the jury is quite erroneous and the trial court's specific instruction that,

"If that boycott existed, I specifically instruct you, shall not specifically consider it a defense to the plaintiff's cause of action." R 233,

points up the error. While it is true that the Court let in the evidence for other purposes, he took away any benefit respondent could have gained by refusal of the requested instruction and directing the jury that the boycott could not be considered a defense.

The instructions denied the defense to the respondent with respect to plaintiff's action under Section 13(a) (Title 15 U.S.C.A.) and the error is not cured by a conjecture that the jury probably misunderstood the court's charge. Such is the effect of petitioner's argument.

The remainder of petitioner's argument fairly directed at this matter has been fully covered in respondent's original Brief.

3. The absence of sales in interstate defeats the petitioner's action during the first 3 months and 24 days of the price cut.

Petitioner argues that when respondent terminated its sales in Farwell, Texas, on January 16, 1948, such termination was a "temporary" suspension. The record does not reflect why such sales were discontinued and, if it were material, the burden was upon petitioner to establish the necessary facts. Without the true fact a conclusion either way could be incorrect. It is, however, immaterial whether the discontinuance was permanent or temporary. The important fact is that respondent was not making sales interstate during the first 3 months and 24 days of the price cut which, as petitioner must agree, nullifies the trial court's judgment because the specific requirement of both Acts that sales be in commerce have not been met.

He complains that it would be impossible to segregate his damages if the first 3 months and 24 days of the price cut were eliminated from his action because, he poses the question:

"Who could say whether it was the first or second half of the price war that caused him to be insolvent?"

In the first place the petitioner did not contend that he was rendered insolvent. In answer to a specific question as to his solvency on page 49 of the Record, he answered that his business was solvent. His answer must have been correct, because at page 319 of the Record there appears a Financial Statement showing his net worth to be \$3,293.62 on July 31, 1949. This was three months after the price cut had been terminated. The boycott, of course, was continuing in four or five of the biggest stores in town. It is also material to note that at page 297 of the Record there appears another financial statement wherein petitioner fixes his net worth at \$2,185.70 on January 31, 1948, which was about the time Mead's first entered Santa Rosa and following a period of 2 years of business without competition.

Petitioner's complaint about the record is without basis for if he was insolvent at the time he closed his business ten months after the price was raised, it was caused by something other than the price cut. In any event, insolvency is not material to the question of damages involved. His proof was limited to alleged loss of profits and value of equipment.

The Second Circuit in *Sun Cosmetic Shoppe, Inc. vs. Elizabeth Arden Sales Corp.* (supra) experienced no difficulty in limiting the plaintiff's damages to losses sustained,

"from the diversion of its customers to those New Jersey 'agencies' to whom the defendant furnished 'demonstrators', so far as that was due to the 'demonstrators' ".
178 F(2) at page 153.

Assuming that petitioner is entitled to recover, no problem would be encountered in properly instructing the jury on the subject.

The remainder of petitioner's applicable argument has been covered in respondent's Brief and in the first part of this Reply Brief.

4. The petitioner has failed to prove the fact of damage.

Petitioner throughout his Reply Brief erroneously states matters of fact and draws conclusions wholly without support in the evidence. We realize that this is not intentional and have in the main taken no issue; however, respondent feels that one or two under this subject should be straightened out, so to speak.

Petitioner makes the statement at page _____ of his Reply Brief that,

"In any event petitioner testified that the physical value of his equipment was \$15,559.34 and the going con-

cern value was \$23,459.34."

and refers to pages 43 and 44 of the Record.

What the petitioner said was: At R 44:

Q. "Refresh your memory, then, from your memoranda. What was the total value of your business, including physical plant **and the good will**, as of September 1, 1948? A. \$23,459.34."

The figure given included his estimate of the goodwill or going concern value, along with the physical value of his equipment.

Again on page _____ he states that the witness, Englehart, testified that the value of equipment increased rather than depreciated between 1947 and 1951. What the witness said was: At R 161:

"I think any rise in the market value of new equipment would take care of the depreciation that had **accrued** against the equipment."

Petitioner's argument concerning the evidence of loss of value of equipment cannot stand up under the undisputed facts established by himself and his witnesses that no loss was shown. Nor can he explain his testimony concerning his alleged loss of profits wherein he refused to say that he could have made a profit in fair competition. All of the evidence and surrounding circumstances, as we have heretofore pointed out, establishes beyond any doubt that his business was not profitable in an open and fair market.

Petitioner's proof was limited to loss of profits and loss of value of equipment; and if there were other basis for a recovery, his proof should have been made thereon and submitted to the jury. This he did not do.

He speaks of "revenue" and says that he lost not only "revenue" but "profit." Just what he means by "revenue"

as distinguished from "profits" is not known. If he had other revenue, he should have offered proof of its existence and submitted the matter to the jury.

The judgment rendered by the trial court cannot stand for the reason that the petitioner failed to establish the fact of damage nor did he furnish relevant data from which his damage, if any at all, could be reasonably estimated.

The remainder of the argument has been covered in respondent's original Brief.

Conclusion

Respondent respectfully submits that the action of the Honorable Court of Appeals in reversing the trial court's judgment and directing dismissal of petitioner's action should be affirmed; and in the alternative that petitioner's recovery be limited to nominal damages or in the alternative that the cause be reversed and remanded for new trial or other relief prayed for in its original Brief.

Respectfully submitted,

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